

JUSTICE FOR HIRE

Improving Judicial Selection



A Statement by the Research and Policy Committee of the Committee for Economic Development

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Library of Congress Cataloging-in-Publication Data

Justice for hire : a statement on national policy by the Research and Policy Committee of the Committee for Economic Development.

p. cm.

ISBN 0-87186-146-1

I. Judges—Selection and appointment—United States. I. Committee for Economic Development. Research and Policy Committee.

KF8776.J87 2002

347.73'14—dc21

2002073639

First printing in bound-book form: 2002

Paperback: \$15.00

Printed in the United States of America

Design: Rowe Design Group

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RESPONSIBILITY FOR CED STATEMENTS ON NATIONAL POLICY

The Committee for Economic Development is an independent research and policy organization of some 250 business leaders and educators. CED is nonprofit, nonpartisan, and nonpolitical. Its purpose is to propose policies that bring about steady economic growth at high employment and reasonably stable prices, increased productivity and living standards, greater and more equal opportunity for every citizen, and an improved quality of life for all.

All CED policy recommendations must have the approval of trustees on the Research and Policy Committee. This committee is directed under the bylaws, which emphasize that “all research is to be thoroughly objective in character, and the approach in each instance is to be from the standpoint of the general welfare and not from that of any special political or economic group.” The committee is aided by a Research Advisory Board of leading social scientists and by a small permanent professional staff.

The Research and Policy Committee does not attempt to pass judgment on any pend-

ing specific legislative proposals; its purpose is to urge careful consideration of the objectives set forth in this statement and of the best means of accomplishing those objectives.

Each statement is preceded by extensive discussions, meetings, and exchange of memoranda. The research is undertaken by a subcommittee, assisted by advisors chosen for their competence in the field under study.

The full Research and Policy Committee participates in the drafting of recommendations. Likewise, the trustees on the drafting subcommittee vote to approve or disapprove a policy statement, and they share with the Research and Policy Committee the privilege of submitting individual comments for publication.

The recommendations presented herein are those of the trustee members of the Research and Policy Committee and the responsible subcommittee. They are not necessarily endorsed by other trustees or by nontrustee subcommittee members, advisors, contributors, staff members, or others associated with CED.

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*Voted to approve the policy statement but submitted memorandum of comment, reservation, or dissent. See page 52.

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Purpose of This Statement

The independence of the judicial system is an essential component of a functioning democracy. But the explosion of interest in, and financial contributions to, judicial campaigns raises concerns. When candidates for judicial office are forced to raise funds and accept donations from law firms or special interest groups that might someday appear before them, their impartiality is brought into question. Even those judges who simply confront retention elections face increased pressure to rule in certain ways around election time, for fear of a possible backlash at the ballot box. In a system based on the rule of law, these variances are unacceptable.

Justice for Hire: Improving Judicial Selection builds on previous CED research on maintaining and improving democratic institutions in the United States. In 1999, CED published *Investing in the People's Business: A Business Proposal for Campaign Finance Reform*. *Investing in the People's Business* took a hard look at the problems of soft money and the increasing influence of special interest groups in campaign financing. One of CED's most influential papers to date, a number of recommendations from this paper were incorporated into the reforms signed into law in early 2002. CED also addressed the issue of the increasingly litigious nature of our society in *Breaking the Litigation Habit: Economic Incentives for Legal Reform* (2000).

ACKNOWLEDGMENTS

We would like to thank the dedicated group of CED Trustees, non-Trustee members, special guests, and advisors who comprised CED's Subcommittee on Judicial Selection (see page vi). Special thanks go to the subcommittee's co-chairs, Derek Bok, President Emeritus, Harvard University and National Chair, Common Cause, and Roderick M. Hills, Chairman of Hills Enterprises, Ltd., for their leadership and guidance. We are also grateful to Project Director Anthony Corrado of Colby College, John Hoff, Deputy Assistant Secretary, Department of Health and Human Services, CED Senior Vice President and Director of Research, Everett Ehrlich, and CED Senior Fellow Van Doorn Ooms for their contributions, and to CED Research Associates Spencer Hutchins and Jeff Loesel for their assistance.

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Chapter 1

Introduction and Executive Summary



An independent and impartial judiciary is a cornerstone of our system of governance. Our society is based on the rule of law, on the idea that laws, democratically enacted, are the supreme governing authority. Judges serve as the guardians of the law. Their role is to uphold the law and maintain the standards needed for a properly functioning, credible, and impartial system of justice. They sustain the vitality and legitimacy of the rule of law by giving it practical application, and we rely on the exercise of their judgment and discretion to give shape to what is at times an indeterminate body of law. This judicial role is best fulfilled by individuals who are responsible only to the law and whose decisions are freed from the influence of public opinion and political pressures.

Our adversarial legal system is predicated on the idea that judges will serve as neutral and dispassionate arbiters and administrators. Litigants depend on a judge's impartiality to secure due process and gain a fair hearing: judges must treat all those who come before them similarly and must render impartial decisions based solely on the facts of the matter before them. This is the only way to guarantee that each case is decided through a principled deliberation with no predisposition as to the correct legal outcome. Such independent and impartial exercise of judicial authority is an essential aspect of a free society, since it promotes respect for the law and thereby inspires voluntary compliance with legal norms.

The methods of judicial selection used in most states fail to live up to this conception of the judiciary. Instead of safeguarding judges

from political pressures, most selection systems invite such influence by requiring judges to gain or retain office through popular election. There are more than 30,000 judges in the 50 states, including more than 1,300 state appellate judges, 11,000 state trial judges, and almost 18,000 limited-jurisdiction judges. Over 87 percent of these judges must face the voters at regular intervals in some type of popular election.¹ Thirty-nine states currently require elections for those seeking or holding judicial office at some level.² In all, 53 percent of appellate judges and 77 percent of trial judges are selected in contestable elections.³ Taken together, the number of elected judges now vastly exceeds the number of elected state legislators and executive officers throughout the country.⁴

While the federal system of judicial selection has encouraged a popular image of justices as appointed officials with life tenure, the reality in most courtrooms throughout the nation is just the opposite. More often than not, those who serve on the highest state courts and those who preside daily over matters of criminal, civil, and family law were placed in office, or remain in office, due to a decision made by voters. The selection methods vary widely, with some states choosing all or most of their appellate and trial jurisdiction judges in nonpartisan contests, while others hold partisan contests where the candidates stand for election on a party ticket. Elections have also become common in many states that employ "merit selection" systems, which were originally designed to respond to the problems posed by judicial election. In these

merit systems, a candidate is initially appointed to office and then required to stand for election after a specified term in order to retain office. These retention elections do not require a judge to face an opponent; instead, voters are asked to vote “yes” or “no” on the question of whether that judge should be kept to serve another term. Only 11 states select judges through appointive processes or merit systems without elections.⁵

The need for judges to appeal to voters and seek campaign contributions to finance their quests for office is antithetical to the ideal of an independent and impartial judiciary. Unlike governors, legislators, or even city councilors, judges are not supposed to represent a particular constituency, appeal to a majority, or even reflect the will of the people. Yet the desire to be elected or reelected may lead a judge to consider public attitudes or the electoral consequences of a decision in rendering a judgment. At a minimum, selection by election enhances the potential influence of political considerations on judicial behavior and increases the prospect of a politicization of the courts, since any decision a judge makes may be made into a campaign issue by an opponent or interest group in the next election. This is especially true in partisan contests, where an elected judge may be perceived by members of the electorate as an adherent to a particular policy view or political perspective.

The need to solicit campaign contributions poses an even greater threat to the independence and legitimacy of the judiciary. The necessity of raising money for a political campaign encourages judicial candidates to engage in an activity that does not befit the decorum of the office and is not conducive to the building of public trust in the judicial process. Accepting campaign money can create the appearance of obligation to those who financially supported a judge’s bid for office. In the worst case, it may subject a judge to outside influence and affect a ruling or lead a litigant to conclude that a donor received

preferential treatment. Any process that selects judges by election jeopardizes public confidence in the judicial process. The need to raise money for election campaigns severely exacerbates this problem.

The problems inherent in judicial elections have become especially acute in the past two decades. The character of judicial contests in a growing number of states has changed dramatically. While most judicial elections continue to conform to the traditional pattern of low-cost, civil affairs, with relatively low voter interest, many judicial races have become fierce electoral battlegrounds. Indeed, the more competitive judicial contests are now indistinguishable from gubernatorial and legislative contests, and they exhibit many of the problems associated with modern political campaigns.

The costs of judicial campaigns are rapidly escalating. In some states, judicial candidates must raise \$1 million or more to gain or keep their seats on the bench. These rising costs force judicial candidates to place greater emphasis on fundraising and encourage these candidates—or their campaign committees—to raise money just like other politicians. To solicit the sums required to be competitive, judges often have to rely on attorneys and law firms as principal sources of funds, which increases the possibility of the appearance of undue influence and creates the impression that justice is for sale.

The rising costs of judicial elections are in part the result of greater competition, but they are also a function of changes in campaign conduct. Competitive judicial elections have become highly politicized and partisan contests. They often feature broadcast advertising campaigns designed to communicate misleading or critical attacks on a judge’s past decisions, or issue advertisements that are designed to elevate the salience of a single issue as a means of shaping voter opinion. This kind of campaigning can place judicial candidates at a distinct disadvantage.

Because of the nature of the judiciary, states have regulated the campaign behavior of judicial candidates to prevent these candidates from engaging in activity deemed inappropriate. These codes of conduct place restrictions on the content of campaign communications and specifically prohibit a judicial aspirant from making pledges or promises of conduct in office or any statements that “commit the candidate or appear to commit” the candidate to certain positions or decisions with respect to controversies that are likely to come before the court.⁶ Consequently, judicial candidates are often limited in their ability to respond to attacks launched by outside interests in their election campaigns. This serves to discourage the robust level of political debate that is needed to facilitate reasonable voter decisions.

However, the legality of these codes has been challenged in the Supreme Court. In June 2002, the Court struck down Minnesota’s statute, a ruling that renders similar laws in eight other states unenforceable.⁷ This ruling promises to have a negative impact on the tone of judicial elections. Contests will become even more combative, and judicial races will take on more of the character of elections for political office. The risk of pre-judgment on issues that may come before a court will increase. Consequently, the independence of the judiciary will diminish. Freeing judicial aspirants to behave more like elected politicians is not a step in the direction of improving our judicial system.

Judicial elections have also suffered from the expanded participation of interest groups. With rising frequency and intensity, interest groups are exerting influence in judicial campaigns, spending millions of dollars to try to elect judges who share their views or will serve their narrow interests. The 2000 elections were a major landmark. Organized groups spent unprecedented sums of money on efforts to defeat sitting judges. In many instances, these groups carried out their campaigns by relying on “issue advocacy advertise-

ments,” advertisements that are not subject to campaign finance restrictions because they do not expressly advocate the election or defeat of a candidate, so that they could spend unlimited amounts of unregulated funding in their efforts to change the composition of the courts. Their intervention in these elections substantially altered the dynamics of these races, and allowed these groups to have a meaningful effect on the election outcomes.

The changes taking place in the judicial selection process raise serious issues that need to be addressed. In our view, recent judicial elections reflect patterns that are reminiscent of those witnessed in congressional elections in the early 1980s. In a growing number of states, judicial races are evidencing an “arms race mentality” of rising expenditures, heightened competition, and growing interest group activity. Judicial selection is thus becoming a political process that places pressure on lawyers, business organizations, and interest groups to get involved in the competition to elect judges who will be favorable to their positions.

As business leaders, we are alarmed by these developments. The dispensation of justice must not be a function of such a subjective factor as who serves as judge. But this is the direction in which the current system is heading. This poses a grave risk to all citizens, since the quality of justice in any one state can affect citizens in every state. For example, a class action brought in one state can include members of the class from around the country. Any particular case thus can determine the rights of litigants in many other states. Groups who are successful in electing judges whom they consider to be favorable to their views can focus their litigation efforts in these states in an effort to improve their prospect of a favorable decision. A logical response, given this possibility, is for opposing parties to join in the fray to elect favorable judges. Legal disputes can thus quickly become political disputes. Litigation may thus be determined more by influences outside of the courtroom

than on the facts of a case and the precepts of the law.

Methods of judicial selection can thus have a major effect on business and the transactions that take place in the economy. Most large corporations can be found doing business in every state and so can be sued in any state. Plaintiffs can choose the state court that will be most favorable to them. The cost of the suit will be borne by every employee, customer, and stockholder, most of whom will be residing in other states.

The effect can be even broader. Knowing that it can be sued in whatever state court is most favorable to plaintiffs, a multi-state business may simply stop selling a product that entails risk of injury (or risk of litigation); it may require consumers throughout the country to pay more for the product; or it may be deterred from initially putting a product out in the marketplace at all. The judgment of one state's courts can determine what is available to consumers throughout the country, as well as what it costs.

For all the considerations expressed above, CED has concluded that elections are an inappropriate and detrimental method of selecting judges. By this we do not mean that elections are incapable of providing highly skilled and effective judges. Indeed, CED recognizes and appreciates the high quality and professionalism of many of the elected judges who now serve on state and local courts. Rather, our position is that elective systems tend to undermine the independence and impartiality of judges. They encourage judges to engage in political and partisan activities that do not benefit the office. They provide outside interests with substantial opportunities to politicize judicial decisions and influence judicial behavior. They thus subvert the fundamental purpose that constitutes their underlying rationale: to promote public faith in the legitimacy of the judicial process.

SUMMARY OF RECOMMENDATIONS

We urge public officials, business leaders, judges, members of the legal profession, and community leaders in the states to join together to help educate the public on the importance of an independent judiciary and the problems inherent in a system of judicial election. We call upon these leaders to take action to initiate reforms that would eliminate judicial selection by election, whether in the first instance or through retention elections. Because we recognize that such a fundamental transformation of the judicial selection process is not likely to occur quickly, we also recommend a number of reforms that can be adopted in the interim to improve judicial elections. While these reforms will not resolve the perverse influences of elections on the judiciary, they will mitigate their most dangerous effects.

CED strongly believes that appointment should be the basic principle that governs the selection of all judges. We therefore recommend that all states select judges through an appointment-based process.*

Appointment-based Selection

Appointment avoids the threat to judicial independence inherent in elections. It facilitates a more deliberative and thorough assessment of the qualifications of judicial candidates than that which takes place in the context of a political campaign. It also opens judicial positions to a broader pool of qualified candidates, because selection is not limited to those who choose to face an election.

Specifically, we recommend that states adopt a commission-based appointment system. In this approach, each state would establish a nonpartisan, independent judicial nominating commission that would be responsible for recruiting, reviewing, and recommending eligible nominees for judicial office. Our conception of the role of a nomi-

*See memorandum by EDMUND B. FITZGERALD (page 52).

nating commission is based on those that are currently operating in 24 states. All appointments to judicial positions would be made from the lists of candidates prepared by the commission. We believe that this approach will allow for a dispassionate and thorough review of the qualifications and abilities of judicial aspirants, and minimize the influence of political considerations in the selection of judges.

Any system of judicial selection must include appropriate mechanisms for holding judges accountable for their performance in office. The requisites of a democratic society demand that a selection process balance judicial independence with accountability. This is particularly important in an appointive selection process, since it lacks what most citizens consider to be the principal means of holding judges accountable: a vote of the public.

To facilitate periodic review and evaluation of judges, we call for the creation of judicial performance evaluation commissions, similar to those now found in six states. All judges should serve for a limited term of office. At the end of this term, an independent judicial performance evaluation commission would conduct a comprehensive, objective review of a judge's performance in office and prepare an evaluation report and a recommendation as to reappointment. This information would be provided to the governor or other appointing authority in a state for use in making a decision on reappointment.

Commission-based evaluation has proven to be an effective means of holding judges accountable for their performance in office. We suggest that these commissions also conduct mid-term reviews of judges as a means of assisting judges in gauging their efficacy and offering guidance for self-improvement. Commission evaluations would provide a source of independent and objective information on judges that is far more comprehensive and unbiased than the narrow, often single-issue based assessments that are common in election campaigns. Performance-based reviews would make a valuable contribution in

enhancing deliberations on reappointment decisions.

We further note that the efficacy of a commission-based appointment system depends on the availability of a broad pool of candidates who are willing to serve as judges. While most of the individuals who seek judgeships do so out of a sense of service to their community or profession, the levels of compensation offered for judicial office can discourage highly-qualified candidates from pursuing such service. **We therefore suggest that state officials review current salaries and ensure that appropriate levels of compensation are provided to judges at all levels.**

We acknowledge that appointive systems do not necessarily guarantee the most capable and independent judiciary. Nor do they wholly eliminate political or partisan influence in the selection process. But we find the merits of this method compelling, especially when compared to the procedures currently being used in most states. In addition, we feel that an appointive system can provide the requisite level of accountability demanded in a democratic society, so long as appropriate safeguards are established.

We also recognize that those states that currently hold elections are not likely to reform their systems any time soon. Numerous bar associations, task forces, and judicial panels before us have called for reform of the judicial selection process and endorsed a move to appointment or merit-based systems. However, public support for elections has remained strong; the voters are not yet willing to relinquish their primary role in the selection process.

Improving Judicial Elections

Accordingly, we have also considered reforms to improve judicial elections. Fundamental changes are needed in the way judicial campaigns are financed and conducted if the risks presented by judicial elections are going to be reduced. While the reforms we offer will not resolve all of our concerns, since

we regard the core problems to be inherent in the nature of elections, we do believe that there are improvements that can be made to minimize the deleterious effects of the most pressing problems.

We find that the most politicized and expensive elections are those in which candidates run under party labels in partisan contests. This method of selection encourages the electorate to view judges as partisan advocates and often features substantial campaigning on the part of party organizations or their interest group supporters on behalf of a party nominee. We therefore strongly urge states that hold partisan elections to end this practice.

Longer terms of office represent another structural change that can help to reduce the political pressures on the judiciary. All too often, judges have to seek reelection on such a regular basis that electoral considerations are always close in mind. By lengthening terms of office, judges will need to raise money and actively campaign less frequently. Longer terms will also lower the prospect of an election dominated by one case or a single recent controversial decision. **We suggest as a general rule that the length of term for trial and appellate court judges should be a minimum of six years and the term for justices on the highest court in a state a minimum of ten years. We believe that terms of this length will provide a better balance between the principles of judicial independence and accountability than those commonly found in current state systems.**

No major improvement in the electoral process will be accomplished without addressing the problems raised by the role of money in judicial elections. The financial demands of political campaigns, especially in the most hard-fought contests, have forced judges to spend more time raising money and have dramatically increased the risk of judicial decisions being subject to the influence of campaign donors. The financial activities associated with judicial elections have led a growing share of the public—and large majorities in

some states—to conclude that campaign contributions do influence court decisions. The need to raise money has thus substantially diminished public confidence in the courts. We are deeply concerned about this problem.

Major reform of judicial campaign finance is needed if the legitimacy of the courts is to be sustained. We believe that the best available means of protecting the judicial process from the potentially corrupting effect of private donations is to finance these campaigns with public monies. **We therefore call for the establishment of a full public funding program for judicial campaigns modeled on the public funding programs now operating in Maine and Arizona in gubernatorial and state legislative elections.** Under this approach, candidates would be able to choose to fund their campaigns solely with public subsidies. Qualified candidates who accept public resources would receive a full subsidy equal to the amount of a set spending limit applicable to a given level of judicial office. Those candidates who accept this funding would be required to forego additional private fundraising and abide by campaign expenditure limits.

We find the case for public funding compelling with respect to judicial elections. In our view, no judge should have to solicit private donations to finance a bid for office. The distinct nature of the judicial office and the need for judicial independence in the administration of law demands that judges be insulated from the potential influence of campaign donors. The best way to achieve this objective is to publicly fund judicial contests.

Beyond the financing of campaigns, we also offer recommendations designed to improve the transparency of financial transactions. **We call for full, effective, timely public disclosure of election funding as an essential element of a system of political finance.** We suggest ways that states can improve their disclosure regulations by making comprehensive reports of candidate finances available to the public and providing electronic access to financial information.

Further, we recommend changes to strengthen and expand the scope of disclosure laws. **We believe that disclosure should be viewed as a responsibility of donors, as well as candidates, when it comes to judicial elections. Attorneys and law firms should be required to make public any direct or indirect contributions they give to judicial candidates.** Placing the responsibility for full disclosure on these members of the legal profession will improve the effectiveness of disclosure regulations. Most importantly, including indirect gifts in a disclosure regime will discourage efforts to circumvent the rules by making contributions to third parties that are acting on behalf of a candidate. Stronger disclosure obligations will better safeguard the judicial process against potential conflicts of interest.

We also believe that the public has a right to know more about the monies spent by organized interests to influence judicial selection. In many instances, interest groups or party committees have relied on issue advocacy campaigns to avoid meaningful disclosure. We argue that these expenditures should be subject to full disclosure and set forth criteria for determining those communications that would be subject to such a requirement.

Finally, we advocate the adoption of judicial performance evaluation commissions, similar to those we recommend for appointed judges, as a means of improving the information available to voters in states that hold retention elections. In this context, the role of the performance evaluation commission would be to determine whether a judge's overall performance merits a vote in favor of retention. The commission would be responsible for publishing an evaluation report and recommending whether the judge should be retained. The content of this report and the commission recommendation would then be widely disseminated to the public through voter guides and other means of communications for use by voters in making their voting decisions. This reform would improve the quality of information available to voters in retention elections and help to balance the often narrow focus on specific issues or cases that has been the norm in contested retention elections.

A more detailed analysis and discussion of our specific recommendations for reform can be found in Chapters 3 and 4 of this report.

Chapter 2

State Judicial Selection Systems: An Overview



State judicial selection systems can be divided into three general categories: appointive systems, merit selection systems, and popular election systems. But this simple taxonomy fails to capture the complexity of state selection processes. Over time, each state has adapted its approach to conform to its own unique experience and the particular structure of its system of state courts. This has produced numerous variations, to the point where very few states can be said to use comparable systems. The result is a patchwork of procedures that in itself raises questions about the efficacy of current methods.

The various state selection systems are rooted in our historical experience and reflect different responses to the issue of judicial independence and accountability that continue to inform public debate.

In framing a government under the Constitution, the founders of our republic adapted the model inherited from England and established a judiciary appointed for terms of good behavior, with nomination by the President and confirmation by the Senate, and removable by impeachment. They opposed the election of judges because of their belief that judicial independence could only be achieved if justices were insulated from the influence of public opinion and the will of the legislature. They defended their choice by noting that a judiciary independent of the people and its representatives was needed to achieve the purposes of law and preserve the democratic values that our new nation espoused. An independent judiciary would

provide steady and consistent administration of the law. It would be a better safeguard for individual liberties against the actions of majorities in society or government that might infringe on rights of individuals or groups. And it would be a more effective check on the power of government.⁸ They thus set forth the principal arguments that have informed the case for appointed justices ever since.

In the early years of the republic, states selected judges in a manner similar to that called for in the Constitution.⁹ In all, the first 29 states to enter the union adopted non-elective variations of the federal appointment process to select most of their judges, although in eight of the original 13 colonies the power of appointing was bestowed upon the legislature, not the chief executive, perhaps to enhance the “democratic” aspects of this authority.

With the rise of Jacksonian Democracy, states began to move towards elected judges. This shift was supported by the argument that elections were needed to ensure the accountability of the judiciary to the people; otherwise, justices would be responsive only to the politicians or bureaucrats responsible for their appointments. The change also reflected the notion that the people are the source of all authority in government and would have more respect for an elected judiciary.

Only 11 states (ten of the original 13 and Hawaii) now hold no judicial elections (excluding probate judges, which are elected in four of these states). In these states, judges are appointed, usually with the assistance of a

nonpartisan judicial nominating commission that develops a list of candidates. Judges are typically appointed to serve for a limited term of office, after which time their performance is reviewed and a decision is made whether to recommend them for reappointment. There are, however, major variations. In Rhode Island, for example, high court judges are appointed for life, while in Massachusetts they serve until age 70.

By the early twentieth century, elected judiciaries were criticized by some progressive reformers “as plagued by incompetence and corruption.”¹⁰ In the view of these critics, elections compelled judges to become politicians and thus undermined the legitimacy of the courts.¹¹ These concerns gave rise to the merit selection system of selection, also known as the “Missouri Plan” for the first state to adopt it, which called for the nomination of state judges by a nonpartisan nominating commission, the appointment of judges for a limited term by a high elected official from the commission’s list of nominees, and a subsequent unopposed retention election to determine whether a judge should be retained. This system was endorsed (and still is) by the American Bar Association in 1937 and was subsequently adopted in a large number of states.

Thirty-nine states hold some sort of election for judges at some level. Elections are used to elect all appellate and general-jurisdiction judges in 18 states. Nonpartisan elections are used in 12 states to select all judges and in seven others to select some judges. Partisan elections, which require candidates to run on a party line, are used in six states to select all judges and in ten other states to fill some judicial positions. These partisan states include Michigan, Ohio, and Idaho, where candidates appear on the ballot without party labels, but their selection and campaigns are otherwise partisan. Five states seek to reduce the influence of partisan politics by holding their elections in “off-periods” to create some separation from the more prominent federal and

state elections that attract the highest voter interest. Pennsylvania, for example, holds judicial elections at the time of municipal elections in odd-numbered years, while Tennessee votes on judges on the first Thursday in August of even-numbered years.¹²

Some version of the merit selection system with retention elections is used in 19 states for at least some judges. The systems vary widely. For example, in California, the Governor recommends names of prospective candidates to a nominating commission, which reviews the qualifications of these nominees, instead of the nominating commission offering candidates to the governor, as is the case in most states. In Illinois and Pennsylvania, judicial candidates are first elected in partisan contests and then run for reelection in retention contests. What is common to these states is the use of retention elections to determine whether a judge will remain in office.

Besides calling for different kinds of elections, state procedures set forth varying terms of office. Among elected appellate judges, about 45 percent have six-year terms, 16 percent have eight-year terms, and the remaining 38 percent have terms of ten years or longer. General-jurisdiction trial judges serve even shorter terms, on average, with 19 percent filling four-year terms, 62 percent having six-year terms, and only 13 percent elected to terms of ten years or longer.¹³ Overall, most judges have to run for reelection or retention fairly regularly.

This brief summary provides some idea of the diverse methods now being used to fill state courts, and the emphasis that is placed on popular election. But it is important to note that, in practice, the methods employed are not as distinct as this summary suggests. While some sort of election is clearly the predominant means of placing judges in office, many judges are initially chosen through an appointment process rather than popular vote, even in those states that mandate election. It has become common in many states for judges to retire before the end of a term,

which provides the governor with an opportunity to make an interim appointment. A recent survey conducted by the American Judicature Society of 11 states that hold elections found that more than half (53 percent) of the 1,929 judges at all court levels in these states were initially appointed to the bench to fill interim vacancies before running in an election.¹⁴ The selection of judges in states requiring election is thus not simply a pure electoral process, just as merit selection systems are not a purely appointive process. Instead, most states employ what is best described as a “mixed system” that combines aspects of appointment and election.

THE CHANGING CHARACTER OF JUDICIAL ELECTIONS

The 2000 elections represented a “watershed” in judicial elections, due to the unprecedented amounts of money spent in judicial races and the fierce competition that took place in a number of high-profile state supreme court contests.¹⁵ These races shared the traits that have come to define so many other political campaigns—a rising tide of campaign money, an emphasis on television advertising, and a predominance of negative campaigning. The 2000 elections signal that our nation is beginning to witness a new era in judicial electioneering. The changes taking place are substantially altering the context of judicial elections and reflect the culmination of a number of trends that have been witnessed over the past two decades. In this section of the report, we highlight some of the major factors that are shaping the new politics of judicial elections.

The Old Style of Judicial Campaigns

Traditionally, judicial elections were low-visibility, modestly-contested civil affairs that were conducted with the decorum and dignity that befits a judgeship. Campaigns for judgeships were low-cost endeavors, in which the candidates raised modest sums or, not uncom-

monly, virtually no money at all. Most judicial candidates conducted grassroots campaigns in which they would speak to groups interested in their candidacies or disseminate literature to make their names known to voters. The vast majority of races were uncontested, so the candidates did not have to mount substantial campaigns in order to be elected or retained. In many cases, candidates simply relied on party support or typical voting patterns to gain election. Even where candidates did campaign, the races attracted little attention from voters. Indeed, low voter awareness and a relatively small number of votes cast were a standard feature of judicial contests.

Given this low level of intensity and relative lack of competition, it is not surprising to find that these contests usually produced high retention rates and little turnover. One detailed analysis of all state supreme court justices in 42 states who served between 1960 and 1992 found that turnover in elections was so low that the method of selection made little difference with respect to either the turnover of judges or their length of tenure in office. While partisan elections produced the highest turnover rates and merit selection systems the lowest, the differences between the two were not statistically significant.¹⁶ Similarly, a study of retention elections held between 1964 and 1998 found that only 52 of the 4,588 judges facing retention votes during this period were defeated. In addition, a majority of those who were defeated were running in Illinois where 60 percent of the vote is required to be retained.¹⁷ The study, however, did show that in those instances where a judge was defeated, some personal characteristic associated with the candidate, such as a controversial opinion he or she had issued, was a key factor in determining voting patterns.

In most states, judicial contests continue to reflect these traditional characteristics, especially in the case of retention elections. Candidates wage modest campaigns in a political environment in which voters have little awareness of the qualifications of the

candidates or their records. Consequently, voter turnout is relatively light.

This low level of participation is partially a function of the long ballots that are needed in states where a large number of judicial candidates are running. As the length of the ballot increases, the number of individuals who actually cast a vote for candidates listed further down the ballot decreases. For example, in Cook County, Illinois, the 2000 election ballot featured four state supreme court justices, nine appellate judges, and more than 150 trial judges.¹⁸ More broadly, an analysis of retention elections held throughout the states from 1976 to 1996 determined that 30 percent of those who cast votes at the top of the ticket did not cast ballots for the judges up for retention.¹⁹ A sizable share of judicial races therefore continue to attract little voter attention or interest.

The New Style of Judicial Campaigns

The traditional patterns in judicial elections began to shift in the late 1970s and early 1980s.²⁰ During this time, certain judicial contests became more intensive and expensive, and the dynamics of judicial elections irreversibly changed.

Perhaps the most prominent example of the emerging shift was the 1978 retention election in California for Chief Justice Rose Bird. Justice Bird's liberal rulings from the bench on such controversial matters as capital punishment galvanized opposition in her retention election. This led to a combative and hard-fought campaign in which her supporters and opponents spent a combined total of at least \$643,000. Bird won by the narrowest of margins, 51.7 percent of the vote, which led her opponents to mount a recall campaign in 1982 that cost at least \$870,000.²¹ The battle over Bird's retention continued into 1986, when Bird and two colleagues were challenged again. The three justices raised a substantial sum of money, but lost. In all, the two sides spent \$11.4 million.

Other elections soon followed suit, leading to a number of contentious, high-cost judicial races in several more states. In the early 1980s, campaign funding became a major issue in Texas judicial campaigns. In 1982, for example, Texas Supreme Court candidate William Kilgarlin financed his unsuccessful \$485,000 campaign primarily with contributions from lawyers who represented accident victims. His opponent, incumbent Judge James Denton, raised \$161,000 in part from funds solicited from lawyers that represented insurance companies. Another Texas judicial candidate accepted \$200,000 from a rancher who had faced a number of lawsuits.²² Contributions to judicial candidates in other states also began to be questioned, including a particularly controversial instance in Pennsylvania, which involved contributions from an attorney whose law firm was in the midst of representing the Pennsylvania Coal Mining Association in a case pending before the court.²³

In other states, the conduct of campaigns became an issue. In a New York judicial race in 1983, the controversy revolved around campaign messages. The election featured radio ads that alleged "mob influence" on certain candidates and "Wall Street domination" of judges, as well as the claim of "organized crime picking and fixing judges."²⁴ In North Carolina, the Chief Justice was attacked in both 1986 and 1990 for his decisions to reverse a handful of death sentences. In Ohio and Alabama, races for seats on the high court began to be hotly contested and therefore increasingly expensive, as plaintiffs and defense interests began to use these races as arenas for pursuing the objectives of businesses and those who seek to file claims against them.²⁵

By the mid-1990s, judicial elections in other states had begun to demonstrate that the races in California, Texas, Pennsylvania, Alabama, Ohio, and North Carolina were not anomalies, but harbingers of things to come.

The amounts raised and spent by judicial candidates, at least in the most competitive races, were on the rise, and elections were becoming more contentious. At least insofar as can be determined from the available evidence, a substantial number of judicial elections were turning into contests characterized by increased competition, higher levels of spending, a growing reliance on funding from practicing attorneys, and expanding interest group activity.

Increased Competition

Judicial elections have become more competitive. A growing number of candidates are willing to contest sitting judges, especially in those cases where a judge has issued opinions that can be used to mobilize opposition or is otherwise considered to be at risk of losing. A number of factors have contributed to this trend.

Judicial elections are not immune to the broader changes in the political and electoral landscape. One reason why judicial elections are more competitive is that all elections in a number of states have generally become more competitive. This is especially true in the South. The demise of one-party dominance in some states has put an end to electoral environments in which most of the competition took place in Democratic Party primaries. In Texas, for example, the success of Republican candidates in the 1980s, including the winning presidential campaigns of Ronald Reagan and George Bush, as well as other Republican victories in state gubernatorial races and contests for federal office, helped to improve the prospects of other Republican candidates seeking office. This led to a greater number of successful Republican candidates for judicial offices and, in turn, to more competitive judicial elections.²⁶

Competition has also been spurred by the role of the courts and their influence on controversial public policy issues. Courts have assumed a more active role in our society as a result of the trend towards more litigation

and the willingness of those involved in legal disputes to take matters to court. Consequently, courts are more involved in policy issues than they were decades ago, and are increasingly asked to rule on disputes over partisan and polarizing issues, such as the death penalty, reproductive rights, school funding, and tort reform. Furthermore, this rise in judicial activism in policy decision-making extends to areas of litigation and tort actions that have significant implications for the economic and political interests involved, whether they be corporations or consumer groups, insurance companies or plaintiff's attorneys, single issue organizations or public interest groups. Many sectors of society can therefore have a stake in judicial decisions, and many individuals and organizations are willing to pursue their interests by playing a role in the selection of judges.

Supreme court elections have become lightning rods for political controversy and serve as a vehicle for politics by other means. The legal disputes heard in the courtrooms are often continued in judicial elections. Recent supreme court races have featured heated debates on such issues as the death penalty, reproductive rights, environmental regulation, and school funding questions. The predominant issue in recent years, however, has been tort reform. For example, tort reform was the dominant issue in the 2000 Alabama Supreme Court elections. In May of 1999, an Alabama jury ordered a company to pay three plaintiffs \$580 million in punitive damages and \$970,000 in compensatory damages for defrauding a family out of \$612 on the financing for a satellite dish. The legislature responded to this decision by enacting a new tort reform law that included caps on damages. Because the court had declared tort reform legislation enacted in 1987 unconstitutional, the business community was concerned about the view the court would take of the new statute. In an effort to secure approval for the law, the business community mobilized to support the Republican candidates seeking positions on the high court, and the elections

produced a 5-to-4 Republican majority, even though Democrats held the governorship and easily won control of both houses of the legislature.²⁷

Similarly, tort reform was a focal point in the Michigan, Illinois, Mississippi, and Ohio Supreme Court races in the 2000 cycle. The races in Ohio were especially combative, since the high court had ruled against business interests on tort reform legislation and workmen's compensation matters by 4-to-3 majorities. Justice Alice Resnick, a Democrat, had authored the 1999 opinion that struck down the tort reform law, which required a cap on noneconomic damages and placed a time limit on the filing of malpractice suits. The plaintiffs in the case were the Ohio AFL-CIO and the Ohio Academy of Trial Lawyers. Justice Resnick therefore became the principal target of an aggressive campaign that pitted business organizations against the plaintiff's bar.²⁸ In this instance, Justice Resnick withstood the assault on her record and was reelected, but only after enduring a blistering negative advertising campaign that drew national attention due to the derogatory content of the ads, including one advertisement that alleged that the justice's decisions were influenced by campaign contributions from trial lawyers.

Increased specialization within the legal profession has tended to exacerbate the politicizing of judicial elections and thus further enhanced competition. In races for positions on civil courts, civil plaintiffs' lawyers and members of the civil defense bar are likely to support different candidates. In races for positions on criminal courts, prosecutors and members of the criminal defense bar are likely to support different candidates. Personal injury lawyers are likely to be at odds with attorneys who represent businesses or professional organizations. This encourages the recruitment and support of candidates, which can lead to more challengers and more competitive races.

While many candidates still seek judicial

office without having to face a serious challenge, or run in retention elections that attract little notice, the level of competition in judicial contests has clearly increased. A recent survey conducted by the Center for American Politics and Citizenship at the University of Maryland offers an indication of just how competitive judicial contests may have become. The survey sampled candidates from 29 states and defined a competitive election as a race in which the successful candidate received between 40 percent and 60 percent of the vote. The findings, which excluded retention elections, revealed that 44 percent of the candidates were involved in competitive contests, while 27 percent were not competitive and 29 percent were uncontested. The report noted that this represented a "remarkably high level of competition," especially as compared to historic norms, and suggested that judicial elections "are even more competitive than elections for the U.S. House of Representatives [where only 35 percent of the races were competitive in 1998] and most state legislatures."²⁹

Rising Expenditures

As competition increases, so does spending. But the dramatic growth in judicial campaign spending cannot be attributed to competition alone. Substantial sums of money are now needed to gain a seat on many of the nation's highest courts. And the money chase in judicial races may just be getting started. The 2000 elections saw a dramatic surge in candidate spending across the country, which suggests that the trend towards more expensive judicial campaigns will continue to escalate in the future.

While high levels of spending are not yet the norm in judicial elections, there is mounting evidence that expensive campaigns are the new reality in many state supreme court races and other high-profile contests. The grassroots efforts of the past have given way to professional campaigns that rely on paid consultants, polling, and broadcast advertising. A new

political environment has forced candidates or their campaign supporters to solicit ever larger sums to finance their bids for office.

Candidates in many parts of the country feel greater pressure to raise money due to the intervention of party organizations and interest groups in electoral contests. Spiraling campaign costs are thus becoming more common, and the trends in many states indicate that money is just as important in judicial races as it is in other political contests.

The growth of judicial campaign spending can be illustrated by the experience over the past two decades in supreme court elections in Pennsylvania and Texas. Between 1979 and 1997, 44 candidates ran for a seat on the Pennsylvania Supreme Court, including 35 who ran in competitive races. The total amount raised by the four candidates vying for a seat on the court in 1979 was about \$614,000, on an inflation-adjusted basis (see Table 1). In 1997, the four candidates who ran for a seat raised almost \$3.1 million, or five

times as much. The average receipts of a supreme court candidate rose from about \$153,000 in 1979 (as adjusted for inflation) to more than \$772,000 in 1997. The amount raised by the winning candidate grew from \$173,000 in 1979 and \$201,000 in 1981, to more than \$1.4 million in 1995 and \$954,000 in 1997.

Similarly, in Texas, the amounts of money spent by supreme court candidates have risen sharply. The average amounts raised by candidates rose from \$155,000 in 1980 to \$1.5 million in 1994, when the changing party dynamics in the state fostered highly competitive elections. In adjusted terms, the average rose from about \$300,000 in 1980 to more than \$1.7 million in 1994, a five-fold increase. Since then, the amounts raised have declined somewhat, due to a lessening of competition brought about by the strength of the incumbents sitting on the bench. Even so, candidates in 1998 averaged more than \$500,000, while the winners averaged more than

Table 1

Receipts of Competitive Pennsylvania Supreme Court Candidates, 1979-97

(in 1997 dollars)

Year ^a	Candidates & Vacancy	Total \$ raised	Mean	Primary total	Primary mean	General total ^c	General mean ^c
1979	4 for 1	613,900	153,475	598,127	149,532	15,773 ^b	15,773 ^b
1981	6 for 2	1,549,033	258,172	899,045	149,841	618,998	154,642
1983	5 for 1	1,170,380	234,076	1,170,380	234,076	— ^b	— ^b
1989	3 for 1	2,817,901	939,300	931,048	310,349	1,886,852	942,686
1993	6 for 1	3,076,362	512,727	1,752,339	292,057	1,324,024	662,012
1995	7 for 2	4,535,075	647,868	1,504,072	214,867	2,963,921	710,980
1997	4 for 1	3,090,878	772,720	1,284,598	321,150	1,806,280	903,140

a. No vacancies existed in 1985, 1987, or 1991; thus no election for an open seat was conducted.

b. One candidate captured both parties' nomination in the primary and ran unopposed in the general election in 1979 and 1983.

c. Total and mean expenditures are for primary winners only; a few primary losers reported modest contributions totaling \$100,000 during the general election reporting period. Final sums and means reflect only contested elections.

SOURCE: James Eisenstein, "Financing Pennsylvania's Supreme Court Candidates," *Judicature*, vol. 84, no. 1 (2000), p. 13.

\$800,000. These sums represent a substantial increase over the amounts spent less than two decades earlier.³⁰

The experiences in Texas and Pennsylvania are not atypical. Other state supreme court elections indicate similar trends. For example, in Ohio, the race for Chief Justice of the Ohio Supreme Court in 1980 cost \$100,000; six years later, the race cost \$2.7 million.³¹ In Alabama, the amounts spent by supreme court candidates grew from \$237,000 in 1986 to close to \$2.1 million ten years later.³² In North Carolina, the largest amount spent in a supreme court race in 1988 was \$90,330; by 1994, that amount had increased to \$241,000.³³ And this trend toward greater spending is not confined to races for the highest courts. In California, median spending on contested elections for the Los Angeles Superior Court went from \$3,000 in 1970 to \$70,000 in the early 1990s.³⁴ In Lackawanna County, Pennsylvania, the top three candidates for the Court of Common Pleas spent a combined \$600,000, which was more than the total amount spent by the eight candidates seeking positions for the Superior Court, which is a statewide office.³⁵

More broadly, an analysis of the spending of those candidates who raised money for a supreme court race in recent years shows an upward trend. The 116 candidates who raised funds in the 1996 election cycle received an average of about \$260,000, with median receipts of about \$99,000. In the 2000 cycle, the 110 candidates who raised money solicited \$431,000 on average, with the median amount rising to \$244,000.³⁶

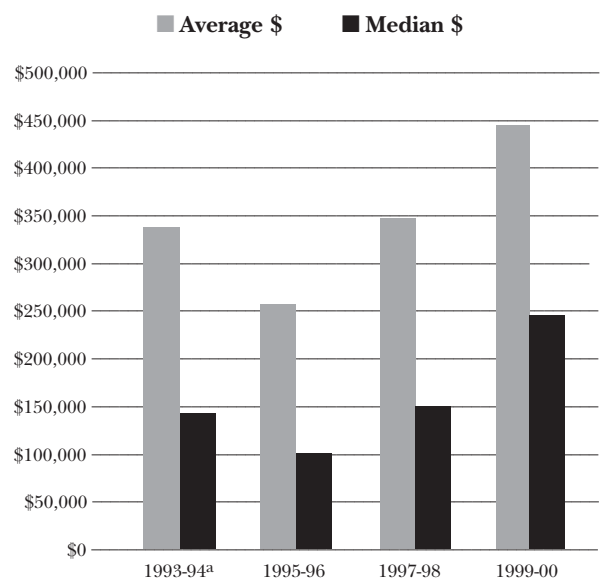
The experiences in these elections proved to be a prelude of things to come. As the data for 2000 indicate, judicial election spending spiked upwards in this year, reaching levels that represented more than a simple extrapolation of prior trends. In all, state supreme court candidates raised a total of \$45.6 million, which represented an increase of 61 percent over the total received in 1998, and twice the amount received in 1994. In a number of

states, new high-water marks for judicial spending were established. The average amount raised by a state supreme court candidate rose to more than \$430,000, which was 25 percent more than the average amount received in 1998. Candidates in the major electoral battlegrounds averaged even higher sums. In Alabama, supreme court candidates averaged more than \$1.2 million; in Michigan, more than \$750,000; and in Illinois and Ohio more than \$640,000. Overall, 16 judicial contenders each solicited more than \$1 million for their campaigns in 2000.³⁷

This steep increase in judicial spending is largely a result of a greater reliance on

Figure 1

Average and Median Funds Raised by Supreme Court Candidates, 1993-2000



a. This data comes from surveys conducted by the Justice At Stake Campaign. The data only includes candidates who raised funds during the cycle in question. Generally, about three-quarters of candidates raised funds. The exact number of candidates in each group is as follows:
 1993-94: 97 candidates, 72 raised funds;
 1995-96: 156 candidates, 116 raised funds;
 1997-98: 131 candidates, 95 raised funds;
 1999-00: 152 candidates, 110 raised funds.

SOURCE: Deborah Goldberg, Craig Holman, and Samantha Sanchez, *The New Politics of Judicial Elections* (New York: Brennan Center for Justice and National Institute on Money in State Politics, 2002), p. 8.

television advertising as a means of communicating with the electorate. Judicial candidates engaged in the most competitive campaigns are devoting a substantial share of their campaign budgets to broadcast advertising. An analysis of supreme court candidate spending conducted by the Brennan Center for Justice at New York University School of Law and the National Institute on Money in State Politics found that between 1989 and 2000, these candidates spent about 25 percent of their campaign budgets on media and advertising. In 2000, supreme court candidates spent an estimated \$6.4 million on television advertising, all of this by candidates in the four states with the most hotly contested elections—Alabama, Michigan, Mississippi, and Ohio. The use of broadcast advertising was especially intensive in Ohio and Michigan. Television advertising accounted for more than half of the total expenditures of judicial candidates in Ohio, and almost half of the spending done by candidates in Michigan.³⁸

The type of election held by a state is another factor that has a significant effect on candidate spending. Candidates in states with merit selection systems are required to run in retention elections only, where they face no opponent, but may be removed from office by the electorate. In most cases, these candidates perceive little risk of losing their seats, except in the relatively rare instances in which the election has been politicized by opposition groups that disagree with a judge's decisions. In contrast, candidates in partisan elections usually run in contested races, where they do face opponents and voting tends to be divided along party lines. Candidates in these elections often feel the need to spend significant amounts of money to win the approval of voters.

The relative competitiveness of different types of elections is reflected in spending patterns. Partisan elections are by far the most expensive, and retention elections the least. From 1990 to 2000, candidates who ran in partisan races each raised, on average, more

than \$444,000, or almost four times the amount raised by candidates in nonpartisan elections, who each averaged \$122,000.³⁹ If the 2000 election cycle is considered alone, the amounts spent were considerably higher than these longer-term aggregates. In 2000, partisan candidates spent an average of slightly more than \$600,000, while nonpartisan contenders spent about \$302,000. The level of partisan candidate spending is equivalent to the levels of spending found in U.S. House races.⁴⁰ In contrast, only one out of every 16 candidates who ran in retention elections from 1990 to 2000 even had to raise money.⁴¹

Sources of Contributions:

The Role of Lawyers

The rising costs of judicial campaigns heighten concerns about the sources of candidate funding and the effects of campaign contributions on judicial independence. These concerns are especially pronounced when campaign money comes from donors who may litigate before a court or represent interests that have a direct stake in the outcome of judicial decisions. In the current system, such sources constitute the major source of judicial campaign money.

Unlike most other political candidates, judges do not represent constituencies. They cannot initiate specific policies or advocate specific policy views that are shared by broad segments of the electorate or hold special appeal to particular groups of citizens. They cannot publicly avow their views on legal disputes that may come before them or commit in advance to vote a certain way on a given issue. They should not join with other elected officials to pursue common political agendas, and usually seek office independent of any party organization. In other words, judges do not engage in the political practices on which most candidates for elective office rely to build a base of political support and appeal to a broad base of potential donors.

In the quest for political contributions,

judges are also hampered by the fact that they tend to be relatively unknown to the electorate and lack popular name recognition. Those who know them best tend to be those who practice law or have an interest in the workings of the court. Accordingly, a substantial portion of the monies raised by judicial candidates comes from attorneys or law firms, or sources with a stake in a matter that is before, or might come before, a court. The need for judges to raise campaign money thus increases the potential for real or perceived conflicts of interest and enhances the possibility that judicial rulings will be considered by the public as a response to donor influence.

There is no uniform pattern of attorney contributions across the states. In some states, they constitute a large share of the monies raised by judicial candidates; in others, they represent only a small fraction. It appears, however, that in those states where expensive contests have become common, attorneys and law firms provide about half of the money raised by candidates. The rest comes mostly from companies or economic groups that may be affected by court judgments.

For example, in Pennsylvania, Texas, and Ohio, three of the states that have experienced significant growth in the costs of judicial campaigns, attorneys are the single largest source of campaign funds. A review of more than 23,000 contributions of \$50 or more made to Pennsylvania Supreme Court candidates between 1979 and 1997 showed that 49 percent of all donations came from attorneys, law firms, or law political action committees.⁴² Almost half of the money received by Texas Supreme Court candidates between 1994 and 1998 came from lawyers and law firms, while another 13 percent came from energy companies and 12 percent from finance, real estate, and insurance companies.⁴³ In Ohio, supreme court candidates from 1993 to 1998 received 52 percent of their funds from lawyers and lobbyists, and another 11 percent was contributed by finance, real estate, and insurance companies.⁴⁴ In West Virginia, trial lawyers

were responsible for more than half of the funding received by three of the four supreme court candidates seeking election in 2000.⁴⁵

The Expanding Role of Interest Groups

Organized interest groups are another important source of funding and support in judicial campaigns. Interest groups seek to use their resources to influence the composition of the courts, just as they seek to influence the selection of members to the other branches of government. In the election context, organized groups make contributions to candidates. They also independently initiate direct mail campaigns, advertising campaigns, and voter turnout programs to assist their favored candidates. In addition, groups endorse candidates in an effort to provide voters with a cue that could determine their ballots. They can therefore exert a substantial influence in judicial campaigns. Their basic purpose is to elect judges whom they believe will support their interests.

The expanding involvement of the courts in controversial public policy issues has provided interest groups with a strong incentive to be more active in judicial campaigns. These incentives were recently summarized by Judge Paul Carrington in the context of the developments that have taken place in Texas.

Political interest groups and parties began about 1980 to take a heightened interest in judicial elections. In some states, tort and insurance law moved to the top of the political agenda for judicial elections. By 1980, local groups of personal injury lawyers were organized to secure the election of judges favoring their clients. For a time, they seemed to control elections to the Supreme Court of Texas. Their success, however, evoked a response from insurance companies and others whose financial interests were threatened by a 'plaintiff's court,' and in recent years, "habitual defendants" have been more successful in securing the election of judges thought to favor their interests.⁴⁶

Because court rulings may affect many issues and interests, interest groups have an

incentive to mobilize in favor of certain judicial candidates. This often provokes a counter-mobilization by opposing groups. A diverse array of interest groups has thus focused on judicial contests as a vehicle for pursuing their narrow interests. The most active participants tend to be groups on either side of politicized issues, including the death penalty, abortion rights, tort reform, landowner property rights, and a host of local issues. Some groups now even regard the courts as their principal arena of public policy conflict, even more so than the legislature, providing further impetus to their willingness to devote their resources to these contests.

Interest groups also have an incentive to participate in judicial elections because they have a distinct advantage in shaping the political discourse in these contests. Due to the nature of the office, judicial candidates are not permitted the same ability to speak freely in election campaigns as is granted to other elected officials. Most states holding judicial elections have adopted some form of the 1990 version of the American Bar Association's Model Code of Judicial Conduct, which is designed to protect the independence and impartiality of the judiciary by placing restrictions on political activities deemed inappropriate to the judicial office.⁴⁷ These codes of conduct include restrictions on the content and character of a candidate's communications, whether made in the form of speeches, broadcast advertisements, or responses to questionnaires and other public inquiries. More specifically, many codes prohibit candidates from making or issuing statements that include pledges or promises of conduct in office, other than the faithful and impartial performance of the duties of the office, such as statements that commit or appear to commit a judicial candidate to certain positions or decisions with respect to cases or controversies that are likely to come before the court, or communications that misrepresent the qualifications or positions of either the candidate or an opponent.

Consequently, judicial candidates are confronted with an uneven playing field when opposed by organized groups. A group could make the claim in a campaign advertisement that a judicial candidate would not support the death penalty in a notorious murder case pending before a court; a judge cannot respond by refuting the claim and stating how he or she plans to vote on the matter. Interest groups therefore have a greater opportunity to influence the agenda of public debate in judicial campaigns than they do in legislative or gubernatorial campaigns. This encourages interest group participation in judicial races that entail a vital interest.

Interest groups were especially active and aggressive in the 2000 elections. State supreme court contests, in particular, were notable for the intense levels of interest group electioneering that they attracted. These efforts often defined the major issues in the race, and reflected an attempt by organized groups to influence the outcomes in particular states. Their expenditures contributed to the high costs in these elections, since candidates were forced to try to match the resources being spent against them.

Although the candidates were responsible for most of the spending in judicial elections, interest groups and political party committees organized as never before to elect "their" judges in the 2000 contests. In the major battleground states—Alabama, Michigan, Mississippi, and Ohio—groups carried out television advertising campaigns designed to supplement the advertising being done by their preferred candidates. Most of these efforts took the form of "issue advocacy" advertisements—ads that did not "expressly advocate" the election or defeat of a candidate because their texts did not include specific words such as "vote for" or "support." This tactic allowed interest groups to circumvent applicable campaign finance regulations and spend unlimited amounts without having to disclose their expenditures or sources of funding to the public.

The advertising done by interest groups set the campaign agendas in the battleground states. In all of these races, interest groups emphasized highly controversial, “hot-button” political issues that became the focal point of the campaign. In fact, the emphasis on tort liability and reform in the 2000 elections was largely a product of interest group advertising. Of all the ads broadcast in the battleground states on liability issues, about two-thirds were paid for by interest groups and political party committees.⁴⁸ The interest group campaigning framed the debate, thereby forcing the candidates, or the parties that supported them, to respond.

Interest group electioneering also exerted a major influence on the tenor of the debate in these contests. Instead of presenting the qualifications and credentials of those seeking office, organized groups criticized candidates for their views on specific issues, thereby challenging their character and impartiality. Of the 24 separate ads sponsored by groups or party committees, only one discussed a candidate’s qualifications or background. More than 80 percent of these ads, according to interpretive criteria established by the Brennan Center for Justice, were “attack” ads broadcast against particular candidates.⁴⁹ This type of negative campaigning, which is the type of campaigning judicial codes of conduct were designed to prevent, principally served to tarnish the image of judges and weaken public confidence in those judges who were placed on the bench.

The most extensive campaign in 2000 was the one waged by the U.S. Chamber of Commerce’s Institute of Legal Reform and its affiliated state organizations. The Institute mounted aggressive campaigns in judicial races in Alabama, Indiana, Michigan, Mississippi, and Ohio, as well as in the state attorney general race in Indiana, at a reported cost of at least \$10 million.⁵⁰ Of the candidates the Chamber endorsed, 13 of 15 won. In Ohio, the Ohio Chamber of Commerce ran a television ad that challenged the integrity of

Justice Alice Resnick, who had authored a controversial tort law ruling. The ad featured a statue of “Lady Justice” peeking beneath her blindfold, while piles of special interest money tipped her scales. The ad asserted that her support for positions advocated by trial lawyers was linked to the contributions she had received from attorneys in her previous race, and concluded: “Alice Resnick. Is Justice for Sale?”⁵¹ Here the strategy may have backfired, since the ad itself became a central issue in the race, and Justice Resnick won her election.

Interestingly, the Michigan Chamber of Commerce also participated in the Ohio race. The Michigan organization ran newspaper and television ads that urged Ohio businesses to move to Michigan because “the judicial restraint of the Michigan Supreme Court and fair laws have helped create a healthy economic climate in Michigan.”⁵² In Mississippi, the Chamber spent an estimated \$958,000 on behalf of the Chief Justice, two other incumbents, and one challenger. This effort led trial lawyers to form two political action committees to oppose the Chamber’s campaign. These committees, Mississippians for An Independent Judiciary and Mississippians for Fair Justice, spent a combined \$312,000. The Chief Justice, who had served for 18 years and had never been opposed in prior elections, lost the contest in an upset.

The Chamber was not the only interest group active in the 2000 elections. The Ohio race also featured electioneering by Citizens for a Sound Economy and Citizens for a Strong Ohio, two business-related groups, as well as teacher and labor unions, and trial lawyer associations.⁵³ In Illinois, a tort reform group, the Illinois Civil Justice League, spent about \$25,000 to run advertisements in 15 newspapers.⁵⁴ In Idaho, a sitting Supreme Court justice, who had authored an opinion that upheld a federal reserved water rights claim in three wilderness areas, was defeated in an election that featured significant campaigning by both the Democratic and Republican parties, as well as the Idaho Trial

Lawyers Association, the Idaho Christian Coalition, and a political action committee called Concerned Citizens for Family Values.⁵⁵

Former federal judge and Congressman Abner Mikva, commenting on the 2000 Illinois Supreme Court elections, noted that “every special interest in the state—the insurance, the defense bar, everybody—is there with big bucks to promote their candidates.”⁵⁶ This observation could be applied to a large number of states. Interest group electioneering is a staple of competitive judicial campaigns, and stands as another source of the increasing political pressures being placed on judicial candidates.

Summary

Recent election cycles indicate a trend towards more expensive and combative judicial elections. In a growing number of races, judicial contests are defined by the practices and patterns that have led many observers to condemn, in general, the conduct in political campaigns. The money flowing into competitive judicial elections suggests that campaign financing is playing a greater role in the judicial selection process. The ability to raise funds is becoming an increasingly important aspect of a bid for judicial office, requiring candidates, especially those in highly competitive and partisan elections, to place greater emphasis on the solicitation of campaign gifts. While this emphasis on fundraising has not become a predominant characteristic of most judicial elections, current trends indicate that big spending is on the rise and that larger campaign coffers are going to be needed by an expanding number of candidates.

Candidates targeted by political groups will feel the greatest pressure to raise money, especially if interest groups and political parties adhere to the strategic approaches they adopted in 2000 and continue to engage in aggressive campaigns to influence judicial selection. In attempting to meet the financial demands generated by a changing political environ-

ment, these candidates may be encouraged to solicit even larger sums from members of the legal profession and others who are likely to have an interest in judicial outcomes. The current system of judicial elections thus poses a great risk to the independence and impartiality of judicial outcomes. Indeed, it is our view that it is already taking a toll on the legitimacy of the judicial process.

THE EFFECTS OF JUDICIAL ELECTIONS

Courts are *legal* institutions. Judges are expected to act on the basis of legal principles, not political principles. A judge’s role is to serve the law, not the political forces of the moment, and to do so in an impartial and neutral manner. Judges are not supposed to react to public opinion as legislators are. The popular will is embodied in laws enacted by political institutions—legislatures and governors—subject to the overriding constraints of the federal and state constitutions, which may also be determined by the public will through the amendment process. Judges are supposed to interpret and apply these laws with a responsibility only to the law itself and, to the extent not changed by statute, accepted principles of common law. Insofar as judges abandon this strict adherence to law in exercising their judgment, so do they abandon the distinctive claim that distinguishes them from members of the other branches of government and from other processes of dispute resolution.

To be effective, the rule of law requires an independent and impartial judiciary that is free from political influence. Selection by election operates against this fundamental principle. Elections subject judges to political pressures and electoral incentives that encourage them to take notice of the demands of public opinion and voter response to their positions in the performance of the responsibilities of judicial office.

Competitive election contests place pressure on judges to defend past decisions and to take positions on issues that may come before them. In theory, judicial campaigns could be waged on the basis of a candidate's qualifications for office, character, or general approach to judicial decision-making. There are judicial elections, especially those retention elections that attract little public attention, as well as many of the races for lower court positions, that are characterized by this type of discourse. But even these contests can necessarily and quickly evolve into a discussion of the specifics of how a candidate has ruled or would rule on particular issues. A fundamental purpose of elections, after all, is to provide the electorate with an opportunity to make a choice of candidates "based on the issues."

The experience of competitive elections has demonstrated that judicial elections, in practice, are principally referenda on how a candidate will decide or has decided cases, or else a debate on specific issues that are salient to voters. This is particularly likely when there are strong opinions among citizens about an opinion issued by a judge, or strong views held by an interest group about the merits of a judicial candidate. The pressure on candidates to make their positions known is thus intensified. Some candidates may react by deciding to make statements indicative of their views, or encourage surrogates to speak for them. Elections therefore contain the threat of pre-judgment, which undermines the objective dispensation of justice. As the intensity of a campaign increases, so does this risk.

The prospect of facing an election, especially a potentially divisive election, may pressure judges to give greater credence to popular opinion and make it more difficult for them to make independent and objective decisions. Elected judges face the same electoral concerns as other elected officials. It would not be surprising to find that some judges yield to the temptation to make decisions that satisfy the demands of a vocal and committed

group of voters. Indeed, inherent in the concept of electing judges is the idea that these officials should in some way be accountable to the popular will, or at least be affirmed by the citizenry as a legitimate claimant to office. The risk to judicial independence created by these electoral incentives is obvious. When the need to face the electorate does influence judges' decisions, however marginally, the proper administration of justice is compromised.

Elections further diminish the legitimacy of the judiciary to the extent that they lead the public to question the impartiality or integrity of judicial decisions. Elections place judicial candidates in a public context that encourages voters to view them as political or partisan figures. Since most citizens do not follow the workings of the courts closely and judges rarely receive the media exposure provided to most elected officials, public knowledge of judicial candidates primarily stems from the information obtained in election campaigns. The conduct of recent campaigns suggests that the information the public receives is presented in highly partisan or politicized informational frameworks. Citizens are unlikely to regard a judge as a neutral arbiter after being exposed to television advertising campaigns that impugn his or her character or question the quality of previous rulings.

Campaign fundraising presents citizens with an even more compelling rationale for doubting the integrity of the court decisions. Given the large sums of money now being raised in some judicial contests, citizens cannot help but question the motives behind such giving, and wonder what effect this money might have on the behavior of judges. These concerns may lead many citizens, including those who come before the courts as litigants in a case, to conclude that preference is given to campaign donors. The need to raise money, especially the need to raise hundreds of thousands of dollars, is an electoral necessity that severely undermines public faith in the fairness of the judicial process.

Effects on Judicial Behavior

The influence of elections on judicial behavior is difficult to determine, because judicial decisions cannot always be explained as a consequence of any one factor. However, the evidence that is available raises alarming concerns about the effect of political considerations on judicial opinions and brings into high relief the detrimental aspects of an elected judiciary.

A telling acknowledgement of the effect elections can have on a judge's thinking was recently made by a member of the West Virginia Supreme Court:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.... [Indeed,] the out-of-state defendant can't even be relied upon to send a campaign donation.⁵⁷

A former justice of the California Supreme Court has warned, "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time."⁵⁸

A justice of the Supreme Court of Texas also highlighted the dilemma under which elected judges are forced to operate. Pointing to the canons of judicial conduct that require a judge to be independent and impartial, Justice John Cornyn suggested that these canons are "a convenient fiction in an elective system." He asked:

How can judges, saddled with all of the baggage of political campaigning and forced to solicit campaign contributions from lawyers likely to practice before their courts, be said to conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the judiciary?....[W]hile electoral accountability is an unquestionably desirable check on the official performance of members of the legislative or executive branches, its shortcomings as a check on judicial power are exposed when it clashes, as it

inevitably must, with the judge's unique role in a republican form of government.... [M]oney and judges simply do not mix.⁵⁹

As Judge Richard Neely has succinctly stated, "I can vouch from personal experience that the campaign contribution problem is extremely acute and almost impossible to handle."⁶⁰

These testaments to the influence of elections on judicial behavior are substantiated by recent research, which supports the view that elected judges must be inevitably motivated in some degree by electoral considerations. A number of studies suggest that justices are more likely to acquiesce to court majorities, due to concerns about the electoral ramifications of votes on controversial issues such as the death penalty. In politically competitive states where justices are chosen on partisan ballots, justices are more likely to join court majorities in controversial cases. In cases upholding the death penalty or involving the imposition of capital punishment, liberal court members are less likely to file dissents from conservative decisions supporting capital punishment. By simply acquiescing and not dissenting, justices reduce the risk that their opinion will be a focal point of a future election campaign, since they do not distinguish themselves from the majority view on the court and, in many instances, the majority view among their "constituents."⁶¹

A judge's decision not to dissent from established court majorities does not change the outcome of a case. So, at least in these instances, the effect of elections, although still questionable, is mitigated. But elections also shape voting decisions in death penalty cases. In certain circumstances, elected judges act to minimize electoral opposition by casting votes that they believe conform to expressed voter preferences. This is particularly true when judges have previous political experience, come from competitive election districts, and are near the end of a term and thus about to face an election. This was the finding of

a study based on the individual votes cast by 35 state supreme court judges in 238 death penalty decisions issued in Texas, North Carolina, Louisiana, and Kentucky, four states where large percentages of the public favored the death penalty as a punishment for murder. Even after factoring in a variety of explanatory factors for judicial voting patterns, the study determined that electoral factors “increased the probability that justices will uphold death sentences initially imposed by trial courts.” It concluded that “concerns for reelection enter into judicial decisions and that judicial behavior reflects the pursuit of both personal and policy goals.”⁶²

Political influences can also shape the decisions in arbitration cases. For example, a rigorous analysis of arbitration cases in Alabama courts found that “arbitration law in Alabama seems to have no doctrinal integrity that survives the vicissitudes of the interest group battle.”⁶³ In arbitration cases in this state, evidence indicates that the court often splits along highly partisan lines. Justices whose campaigns are funded by plaintiffs’ lawyers are all Democrats who oppose arbitration, while justices whose campaigns are funded by business are nearly all Republicans who favor arbitration. The study established “a strong correlation between a justice’s source of campaign funds and how that justice votes in arbitration cases.”⁶⁴

The potential influence of money on court decisions was also the focus of recent research on political contributions to state supreme court justices in Wisconsin. In this instance, every elected justice had received money from an attorney or party who later came before the court. Moreover, 75 percent of the cases heard by the court between 1989 and 1999 involved a party, law firm, business, or other organization that had contributed money to a supreme court candidate. In most instances, however, the sums donated were relatively small, and whether these donations had a material influence on judicial rulings was not determined. Indeed, the evidence was inconclusive: of the 29 contributors who gave

\$10,000 or more, only five appeared before the court, and their success was mixed.⁶⁵

Effects on Public Perceptions

Whether campaign contributions or other political influences shape judicial decisions is only part of the problem judicial elections pose for judicial independence. Just as important, as the Wisconsin example suggests, is the effect of political activity on public perceptions of the courts. With respect to justice, appearance can become reality. The appearance of improper influence can cause citizens to doubt the impartiality of the courts and the integrity of judges. If members of the public believe that judges are influenced by the need to be elected or retained, they may well doubt the fairness of the judicial process and lose respect for the legal system.

Not surprisingly, the monies involved in modern judicial campaigns are fueling public perceptions that judges are beholden to or influenced by their contributors. These attitudes may in part be a reflection of general attitudes about the role of money in politics, developed from the campaign finance issues raised in other types of candidate elections or the recent national debate on campaign finance reform. Nonetheless, these attitudes are becoming pervasive.

While the general level of public confidence in the judiciary remains high as compared to the level of trust granted to other government institutions, citizens display a growing cynicism and loss of faith with respect to the impartiality of the judiciary. For example, a 1999 nationwide survey by the National Center for State Courts found that nearly 80 percent of the respondents agreed that judges are “generally honest and fair in deciding cases.” But the survey also revealed that 81 percent agreed with the proposition that “judges’ decisions are influenced by political considerations,” and 77 percent believed that “elected judges are influenced by having to raise campaign funds.”⁶⁶

Statewide surveys confirm these findings.

In Ohio, a 1995 survey reported that nine out of ten residents believed that campaign contributions influenced judicial decisions.⁶⁷ A more recent poll in Washington State discovered that 76 percent of those surveyed thought judges were influenced by political decisions and 66 percent by having to raise campaign funds.⁶⁸ In Pennsylvania, a 1998 poll conducted for the state's Special Commission to Limit Campaign Expenditures found that 59 percent of the state's citizens felt that judicial candidates "spend too much money," a percentage that rose to 81 percent when those surveyed were told that one candidate had spent \$3 million. Encapsulating the degree to which Pennsylvanians worry about the judicial system, 68 percent agreed with the view that modern campaign trends threaten "the basic fairness and integrity of our political system."⁶⁹

Even more sobering opinions were found in Texas, where a poll conducted by the State

Bar Association found that 83 percent of Texans believed that campaign contributions had an influence on judicial decisions.

Furthermore, this view was shared by those with the most knowledge of the judicial process. In fact, 48 percent of judges, as well as 69 percent of court personnel and 79 percent of attorneys, agreed that contributions influenced judicial outcomes.⁷⁰

These surveys may reflect misperceptions on the part of the public. Even so, they represent a significant cause for concern. An effective judiciary depends on perceptions of its fairness and neutrality. To the extent that members of the public perceive the court to be influenced by campaign contributions, public confidence in the judiciary is eroded. The current system yields perceptions of corruption or undue influence that need to be addressed if the judiciary is to fulfill its purpose in our democratic society.

Chapter 3

Improving Judicial Elections



The American legal system depends on an independent and objective judiciary that decides cases on their merits. As this report discusses, CED believes that electing judges is inherently incompatible with this concept of the judiciary. Most of the litigation in this country—perhaps as large a share as 98 percent of the cases—is conducted in state courts.⁷¹ Most of these state court judges are either selected by popular election or face a retention election. America is the only country that elects such a large proportion of its judges by popular vote.⁷² Such a system is inconsistent with our objective of credible, impartial, and effective dispensation of justice.

Thus, the current system of selecting state judges is in need of fundamental reform. In our view, the best method of promoting independent and impartial judiciaries is to select judges by appointive processes and eliminate elections altogether. But we realize that such a comprehensive reform of state selection systems will not come quickly. Elections in one form or another will continue to be used by most states for the foreseeable future. We therefore recommend states that continue to hold judicial elections adopt a number of reforms that will improve the electoral process. These changes will not eliminate the growing political pressures judicial candidates face, but they will mitigate the worst consequences of the electoral process.

END PARTISAN ELECTIONS AND LENGTHEN TERMS OF OFFICE

Partisan elections are the least desirable form of judicial selection because they present the greatest threat to judicial independence. In partisan races, candidates must run under party labels, which encourages voters to regard them as partisan advocates. This method also spurs party committees to intervene in the campaigns on behalf of their candidates, which increases the amount of negative campaigning and the level of combativeness in these races. Partisan elections, therefore, tend to be the most expensive contests, which compels candidates to place more emphasis on the burdensome task of raising money. They thus lead citizens to conclude that money bears an influence on the actions of judges.

A first step towards improving the current electoral process is to eliminate partisan contests. We strongly urge those states that use this method to select judges at any level to revise their system to include only nonpartisan elections. No judicial candidate should ever be asked to declare his or her partisan preference in seeking judicial office.

Longer terms of office constitute another structural change that would ameliorate political pressures on the judiciary. States that require judges to run for office should ensure that there are long intervals between elections. This will help reduce the adverse effects of electoral contests on judicial behavior. Short terms of office require justices to

present themselves before the electorate more often, thus increasing the possibility that judges will make decisions with political calculations in mind. At the very least, they raise the perception of such influence, particularly when a judge has to render an opinion on a politically salient or controversial matter close to an election year. As we have observed, the vast majority of elected judges must now seek office at least as often as U.S. Senate candidates, and many of them must run even more frequently. Such regular appearances before the electorate encourage voters to regard judges as pragmatic politicians, not neutral arbiters of the law.

Longer terms of office will serve to reduce political pressures by making the need to raise money and actively campaign less frequent. They also lower the chance that an election will be dominated by one recent “hot button” decision. And they may reduce the perception that judges are making decisions based on political calculations geared toward an approaching election. Longer terms therefore promote a better balance between the principles of judicial independence and accountability.

While the appropriate length of a term will vary depending on the type of court and the judicial structure within each state, we suggest as a general rule that the length of term for trial and appellate court judges should be a minimum of six years and the term for justices on the highest court a minimum of ten years.

ELECTIONS SHOULD BE PUBLICLY FUNDED

Campaign contributions to political candidates raise the inherent risk of elected officials providing *quid pro quo* benefits in exchange for political donations or in response to large expenditures made on their behalf. Political fundraising activities are thus a major cause of unease at every level of government. Preventing such corruption or even the appearance of corruption has been deemed

by the Supreme Court to be the compelling state interest in the financing of elections and the principal justification for the regulation of campaign funding.⁷³ The legitimacy of our government is a function of our ability to protect it against the undue influence of campaign monies.

State campaign finance laws attempt to address this imperative in part by placing limits on the size and sources of political contributions. While these measures reduce the potential for corruption, they do not wholly eliminate it. This is especially true in the case of judicial elections. The mere act of soliciting campaign gifts, even when done in accordance with legal limitations, is not in keeping with the role of a judge and can undermine public perceptions of the impartiality of the judiciary. The problem becomes particularly troublesome when judges are required to raise large sums of money from those who have an interest or stake in court rulings, or from those who may appear before the court in some future matter. And, as detailed earlier in this report, these sources are responsible for most of the money in judicial campaigns.

Some states have taken further precautions and attempted to insulate the judiciary from the influence of campaign contributors by imposing restrictions on fundraising activity to avoid appearances of impropriety. For example, 27 states prohibit sitting judges from personally soliciting campaign contributions. Thirteen of these states place the same prohibition on those seeking a judicial position. In these states, candidates are required to form a campaign committee to raise funds on their behalf. But even where these restrictions apply, judicial candidates report spending at least some time raising money.⁷⁴ Furthermore, there is no evidence that the public perceives a major distinction between funds raised by a candidate personally and funds raised by a candidate’s campaign committee. Indeed, the common understanding of how political campaigns work would lead to the conclusion that the two are one and the same. Prohibi-

tions on personal solicitation of campaign gifts by judges are thus a relatively ineffective means of addressing the problems created by campaign fundraising.

Contribution limits and restrictions on candidate fundraising do not go far enough in addressing the issues raised by the role of money in judicial campaigns. **We believe that the best available means of protecting the judicial process from the corruptive effects of political donations is to finance campaigns with public monies.** Simply stated, the more money candidates receive from public sources, the less they will have to raise from individuals and interest groups who may have an interest in influencing particular government decisions. Public funding thus reduces the risk of donor influence.

Furthermore, public funding offers a number of other prospective benefits. It can increase the pool of candidates willing to seek judgeships by opening the selection process to those who might otherwise be deterred by the need to raise large sums of money. It can lower campaign costs by eliminating the need to pay for fundraising efforts. More importantly, it can reduce campaign spending by making expenditure ceilings possible. To date, the Supreme Court has held that campaign spending limits are constitutional only when they are established as a condition of a candidate's decision to accept public subsidies.⁷⁵ Public funding is the key to controlling rising campaign expenditures.

The effect of campaign contributions on the behavior of elected officials and the content of public policies is a matter of grave concern in any branch of government, but it is a particularly acute problem with respect to the judiciary. Throughout this report, we have highlighted the distinct nature of judicial office. The judicial branch of government is based on principles that distinguish it from the other branches of government. Judges are not representatives. They are expected to be independent and impartial arbiters of law, responsible only to the law. Their behavior

must be appropriate to the purposes of their office.

We believe that the case for public financing is compelling when it comes to judicial elections. In our view, no judge should have to rely on private donations to finance a bid for office. The very act of raising money for one's own campaign is antithetical to the principles of judicial independence and impartiality. We therefore strongly endorse the idea of publicly funded judicial elections.

We would prefer a system of mandatory, full public financing for all judicial candidates. This approach, which would require all candidates to rely only on public resources to fund their campaigns, is the optimal solution to the problems we have identified. However, we recognize that the Supreme Court, in the context of presidential elections, and a number of lower courts, in the context of state gubernatorial or legislative contests, have held that public funding systems must be voluntary. Whether the Court would rule differently in the case of judicial candidates, given the distinct nature of judicial office, is yet to be determined. We believe that the character of the judiciary is so substantially distinct from that of other elective offices that it would be reasonable to reconsider current doctrine in the judicial context. We acknowledge, however, that until the Court rules otherwise, candidates cannot be mandated to use public funds. That is, candidates must be allowed to decide whether they want to rely on public funding or continue to run for office using private funding raised from campaign contributors.

Accordingly, we urge states to establish voluntary programs of full public financing for judicial elections. These programs should be modeled on the full public funding systems now being used in Maine and Arizona for legislative and gubernatorial candidates. In this approach, qualified candidates who accept public resources would receive a full subsidy equal to the amount of the spending limit

applicable to candidates seeking a particular office (which in the case of the judiciary would be the relevant level of court). Candidates who accept this subsidy would also have to agree to forego additional private fundraising and abide by campaign spending limits.

To qualify for public funding, candidates would have to meet some pre-established eligibility criteria. The standard for eligibility should ensure an open and equitable system, without promoting frivolous or unqualified candidates. For candidates in merit selection states who are running in a retention election, eligibility for public funding could be based on a positive evaluation of the candidate as determined by a state's retention evaluation commission (which is discussed at further length below). Candidates who receive a recommendation for retention would automatically be eligible for public funding.

In states that select candidates through elections in the first instance, eligibility would have to be determined by some other means. The public funding systems now operating in some states and localities usually require a candidate to demonstrate a certain level of public support, either by raising a fixed number of small contributions from individual donors or by gathering a number of petition signatures from qualified voters. In our view, the petition requirement is to be preferred, since it obviates the need for any fundraising on the part of judicial candidates. But a petition requirement alone may not be an adequate safeguard against frivolous candidates. We would recommend that states also establish some objective criteria to establish that a candidate is qualified for judicial office. For example, states should require that a judicial candidate, especially in the case of trial and appellate courts, as well as a state's highest court, have a law degree, be admitted to practice before the court on which the candidate is seeking a judgeship, and be certified as a candidate in good standing by the appropriate bar organization. Candidates who fulfill these basic eligibility criteria and acquire a

requisite number of petition signatures would be eligible for public funding.

The amount of the subsidy would be established by a predetermined formula. It is essential that the amount be sufficient to ensure that participating candidates have the resources needed to wage a meaningful campaign. The experience with public funding programs now used in some states has demonstrated that the adequacy of the resources provided to candidates is a key determinant of their willingness to participate in the program. If candidates perceive the amount of the subsidy to be inadequate, they will be less willing to accept public funding. **We recommend a limit no lower than the average amount spent by candidates seeking a specific judicial seat in the prior two election cycles.**

One drawback to a voluntary program, which informs our preference for a comprehensive public funding approach, is that it may place participating candidates at a competitive disadvantage. A publicly-funded candidate who is opposed by a privately-financed challenger or by a challenger spending unlimited amounts of his or her own personal funds may face the prospect of being outspent by substantial margins, since a privately-funded challenger or self-financed challenger would not be subject to spending limits. Candidates anticipating a serious challenge from a privately-funded opponent might thus be discouraged from accepting the public funding option. **In order to minimize this incentive not to participate, a public funding program should provide supplemental resources for candidates facing non-publicly funded opponents. This additional subsidy would be based on a non-publicly funded challenger's level of spending. Once that challenger has exceeded the spending limit established by the public funding program, the publicly-funded candidate would receive supplemental funds on a dollar-for-dollar matching basis up to a total of twice the amount of the spending limit. This supplemental funding provision should also be applied to independent expenditures**

made by interest groups against a publicly-funded candidate.

These matching provisions will help ensure that public financing does not create a drastically uneven playing field among the candidates, and thus help to encourage broad participation in the program. But this provision does not entirely solve the strategic problem a publicly-funded candidate might face.

Organized groups can still outspend a judicial candidate by substantial amounts, since they are not subject to spending limits. Similarly, privately-funded candidates or candidates spending their own personal funds will be able to spend unlimited amounts. Thus, in some instances, the availability of public funding might serve to increase the total amount spent in a given election, since it may stimulate non-publicly-funded challengers or groups to spend even more money in an attempt to outpace a publicly-funded opponent. Consequently, voluntary public funding offers only a partial solution to the problems of campaign spending.

We are aware that the costs of a public funding program will place a greater burden on the budgets of state and local governments, which are already hard pressed to meet growing public demands. However, we believe that the maintenance of an independent and untarnished judiciary constitutes a public good that merits the expenditure of public resources. We realize that the experience with public funding programs has demonstrated that financing can be a major issue that can undermine the effectiveness of this approach. Some state legislatures, including most recently the Massachusetts legislature, have been unwilling to approve the resources needed to sustain public financing programs. In those instances where a state cannot accommodate the costs of a broad-scale public funding program for all judicial candidates, we would recommend that they at least provide the funding needed to finance the primary and general election campaigns of those seeking positions on the highest courts and appellate courts. The

problem of guaranteeing adequate financing is another obstacle that must be overcome if public funding is to be effective.

IMPROVING DISCLOSURE OF ISSUE ADVOCACY CAMPAIGNS

Full, effective, timely public disclosure is a necessary component of any system of political funding and a cornerstone of campaign finance law. It is an essential safeguard against corruption or the appearance of corruption, since it ensures the transparency needed to subject candidate finances to public scrutiny, as well as to ensure proper enforcement of the law. Disclosure also allows voters to make more informed decisions by providing a means of judging a candidate based on his or her sources of financial support.

Given the inadequate state of the current disclosure regulations applied to judicial candidates, there is a pressing need for further regulation in this area. Many states do not make comprehensive reports of the receipts and expenditures of candidates readily available to the public or prepare summary reports of judicial campaign financing for public distribution. Few post information on web sites or provide electronic access to judicial campaign data. States need to review their disclosure statutes to ensure timely and readily available public access to such information.

We further believe that members of the legal profession have a responsibility to disclose the financial assistance that they provide to judicial candidates. Attorneys and law firms should be required to disclose any direct or indirect contributions they make to judicial candidates. These disclosures should be reported to the relevant state campaign or elections administrative agency, which would disseminate the information to the public in a suitable form. Placing the onus on members of the legal profession to assume responsibility for reporting both direct and indirect donations will ensure more effective disclosure and better safeguard the judicial

system against potential conflicts of interest. It will also reduce the incentive to circumvent disclosure by means of donating funds to third party groups or independent political committees that support a candidate.

One of the most prominent changes that has taken place in the financing of judicial elections is the rise of issue advocacy advertising by organized groups in connection with specific judicial contests. Because these advertisements and other types of communications do not “expressly advocate” the election or defeat of a specific candidate, as defined by the courts, the monies spent on them do not have to be disclosed under most state disclosure statutes. **In order to ensure greater transparency of the monies spent in connection with judicial campaigns, these statutes should be revised to include a narrowly tailored provision to disclose the source of funding for any ads that are clearly intended to influence the outcome of a judicial election, whether or not the ads specifically call for the election or defeat of a named candidate.**

The states should adopt standards to ensure that the monies raised and spent on issue advocacy advertising in connection with judicial campaigns are fully disclosed to the public. State disclosure laws should set forth clear criteria for identifying public communications that would be required to be disclosed under election finance regulations. These criteria should include communications that: (1) refer to a clearly identified candidate for judicial office, or feature the image or likeness of a clearly identified judicial candidate; (2) are broadcast on television or radio, or distributed to voters through direct mail, non-broadcast advertisements, or voter pamphlets; (3) achieve some threshold aggregate amount in expenditures that would trigger disclosure requirements; and (4) are broadcast or distributed in close proximity to an election. Any campaign communications that meet these criteria would have to be disclosed to the public. The disclosure requirement should

include the sources of funding and the amounts expended.

We recognize that this proposal may not withstand judicial scrutiny. But given the nature of judicial elections and the potential influence of such advertising campaigns on the outcomes of judicial elections, we believe that these regulations are justified and that there is a compelling interest served by establishing them. In the event that the approach we have outlined is not upheld by the courts, we would support the most comprehensive regime of disclosure permitted.

ESTABLISH JUDICIAL RETENTION EVALUATION PROGRAMS AND PUBLISH VOTER GUIDES

Most retention elections are less combative than other types of judicial elections, because the candidate standing for retention faces no opponent. When a judge does face opposition in a retention election, the debate is usually provoked by an organized group that is challenging the candidate on the basis of a single issue or a decision rendered in a particular case. Retention elections are therefore waged on the basis of little or no information about a judge’s overall record or qualifications. In most instances, voters lack useful information about a judge’s performance in office, so they cast uninformed or undifferentiated ballots or fail to cast a vote at all in these contests. This lack of information leaves candidates vulnerable to well-funded, single-issue opposition campaigns.⁷⁶

We believe that states that employ merit selection systems and hold retention elections to determine the continuing service of judges could improve the election process by establishing judicial retention evaluation programs to assess judicial performance. These programs enhance the level of accountability in the selection process by requiring a thorough and objective assessment of a judge’s

qualifications and performance in office. They also increase the amount of information available to voters, thereby reducing the possibility of poorly informed voter decisions.

Six of the 19 states that hold retention elections have created judicial retention evaluation programs. In 1976, Alaska became the first state to adopt such a program. In 1997, New Mexico became the most recent. The others are Arizona, Colorado, New Mexico, and Tennessee.⁷⁷ These programs were developed to respond to the need for voter information in retention elections.

The programs are based on a common model. Each state has established a commission responsible for evaluating candidates for retention. In most instances, commission members are appointed by elective officials and/or members of the judiciary, and are funded by the legislature or the judicial branch. For example, in Colorado, the Chief Justice, the Governor, the Speaker of the House, and the President of the Senate each appoint a lawyer and non-lawyer member of the commission. In Alaska, the board of governors of the Alaska Bar Association appoint the lawyer members, the governor appoints non-lawyer members with the approval of the legislature, and the chief justice of the state supreme court serves *ex officio*.

A retention evaluation commission is responsible for measuring each judge's performance, based on a variety of objective criteria or performance standards that are established by law and are openly accessible to judges, evaluators, and the public. The commission may meet with the judge and collect data such as caseload statistics, disposition records, disciplinary sanctions, and other non-survey information. In addition, surveys of court users are conducted to solicit opinions of the judge. This information becomes the basis for a summary of findings that includes a recommendation for retention or notes a failure to meet performance standards.

Evaluations by independent commissions

offer a valuable means of holding judges accountable for their behavior in office. This approach is far less politicized or subjective than other alternatives such as a decision made solely by an appointing authority or an assessment based on information gathered in a typical election campaign. It is also more beneficial for judges, since it provides clear criteria and standards that offer guidelines for the execution of their duties. Indeed, a very high percentage of judges in states with these programs claim that the reports issued by the commissions provide useful feedback on their performance. Moreover, nearly all judges consider it to be a fair process, and a majority feel that it holds them appropriately accountable for their job performance.⁷⁸

Further, these evaluation programs have proved to be a valuable means of improving voter knowledge of judicial candidates. Surveys of voters familiar with these evaluation reports in selected cities found that more than 60 percent of voters felt that the official information distributed to the public from these reports influenced their voting choices, and about 67 percent said that the availability of the information made them "more likely to vote in a judicial election."⁷⁹

We therefore conclude that every state that holds retention elections should establish evaluation commissions and offer voters a recommendation on whether a judge should be retained. States should disseminate the contents of these evaluations widely by distributing voter guides and other materials that include this information. In this way, voters will have access to independent, objective information about the candidates.

Voters in retention elections are not the only citizens who would benefit from additional information about judicial candidates. All states that hold elections should publish voter guides that include information about judicial candidates. We recommend that the office of the Secretary of State in each state compile background biographical information on judi-

cial candidates and candidate statements for inclusion in a voter guide that would be published at public expense and made widely available to the public.

CONCLUSION

While the reforms we have suggested will alleviate some of the problems associated with elections, they will not address our most fundamental concerns. Candidates will still have to compete in election campaigns in order to hold office and thus will continue to face political pressures. The availability of public funding will ease the financial pressures many

candidates face, but will not put an end to privately-funded campaigns or to rising campaign expenditures, especially in those contests where one or more candidates eschew public funds. Interest groups will continue to mount extensive efforts to support or defeat particular candidates. The most competitive elections will still devolve into single-issue contests that polarize the electorate. In short, electoral reforms can only go so far in improving judicial selection. To fully address the problems in most state judicial selection systems, a more comprehensive change is needed: the establishment of selection by appointment in every state.

Chapter 4

Improving Judicial Selection: A Call for Commission-Based Appointment



CED strongly believes that appointment should be the basic principle that governs the selection of all judges.

Appointment is the best method of ensuring judicial independence. It is the only selection process that avoids the problems associated with elections, since it is the only method that does not require judicial candidates or sitting judges to participate in some form of popular election to gain or retain office. Appointed judges do not need to solicit campaign contributions. They do not face the electoral incentive to tailor their opinions to the preferences of popular majorities. Nor do they need to be responsive to the pressure tactics of organized interests.

We further support appointment because it is the most inclusive and fair process of selection. In elective systems, including merit-based systems that require retention elections, the pool of judicial candidates is necessarily limited to those who are willing to run in an election. An appointive system promotes a wider pool of candidates, since any qualified individual who expresses a willingness to serve may be considered. Moreover, the assessment of an applicant's qualifications and capacities is conducted through a deliberative process less subject to partisan or political influences than that which occurs in the context of a political campaign. Appointment thus facilitates a more dispassionate and thorough review of the qualifications and abilities of judicial aspirants. Overall, it best guarantees a capable and effective judiciary.

Generally, we support an appointive system that is based on a three-stage process. In the

first stage, a group of eligible judicial candidates would be determined. An independent judicial nominating commission would recruit and review candidates for office and develop a list of potential nominees. In the second stage, vacancies would be filled by appointment. In every instance, an appointment would be made by the appropriate authority as determined by state law, which usually would be the governor, whose choice must be made from the list of candidates submitted by the judicial nominating commission. Each appointee would serve for a limited term of office. At the end of each term, the third stage of the process would commence. An independent judicial performance evaluation commission would conduct a comprehensive, objective review of a judge's performance in office and prepare an evaluation report and a recommendation as to reappointment. The governor or other appointing authority would then be responsible for making the decision to reappoint the judge or make a new appointment.

In supporting selection by appointment, we recognize that this method will not always function ideally. The appointment system can also be affected by political and partisan concerns, as the recent experience in the selection of federal judges demonstrates. However, this method is still to be preferred over elective systems, where inappropriate political influences lurk in almost every case, and public perceptions of impropriety are becoming increasingly pervasive. Furthermore, we believe that appropriate safeguards are available to minimize undue influence in the

appointments process. This is an important reason why we support the use of nominating commissions to assess the qualifications of judicial candidates, in addition to other independent bodies to perform periodic reviews and evaluations of sitting judges.

ESTABLISH JUDICIAL NOMINATING COMMISSIONS

Appointive systems present a risk to judicial independence primarily when appointment is left to the discretion of a single authority, as in the case of vacancy appointments in most states, where the interim position is usually filled by an appointee selected by the state's governor. In these instances, chief executives with sole authority to appoint a judge, or with authority to nominate and appoint a judge subject only to legislative approval, are free to determine the criteria they will use to make a selection. They typically select a political supporter, or only consider potential nominees from their political party in hopes of placing an "ally" on the bench. Frequently, they rely on recommendations from local party officials in making these appointments, thereby associating judgeships with a form of political patronage.⁸⁰

Many states have addressed this problem by establishing nonpartisan, independent judicial nominating commissions as part of their appointment process. At present, 24 states and the District of Columbia use a commission-based appointment plan for the initial selection of some or all levels of the judiciary, and an additional ten states use a similar plan, but only to fill midterm vacancies.⁸¹ While the provisions of state law vary, these commissions generally are permanent, nonpartisan boards comprised of lawyers, non-lawyers, and in some states, ex-officio judges. Most states set terms of four or six years for commission membership. To ensure the independence and nonpartisanship of these bodies, many states divide the responsibility for selecting members among a number of authorities,

including the governor, the legislature, members of the state's highest court, and bar association officers.

These judicial nominating commissions are responsible for recruiting, assessing, and screening potential candidates for judicial vacancies. When a judicial vacancy arises, the commission submits a list of prospective nominees, usually consisting of three to five candidates, to the appropriate appointing authority, which is typically the governor of the state. The governor is then generally bound by law to make a final selection from the nominees included on the list.⁸²

These commissions have received positive assessments from those involved in the appointment process. In a survey conducted by the American Judicature Society in 1991, governors in states with merit selection plans that include nominating commissions expressed favorable views of the system, noting that this approach focuses selection on the merits of the candidates themselves. At that time, these governors agreed that commission-based appointments minimize partisan political considerations, provide high quality nominees, and broaden the pool of applicants.⁸³

This view of the quality of commission-based nominees is shared by the chairs of these commissions. According to a survey conducted by the American Bar Foundation, 89 percent of the commissioners report being satisfied either "always" or "in the majority of cases" with the quality of the candidates they were able to pass along to appointing authorities.⁸⁴

We consider a judicial nominating commission to be an essential component of any appointment-based selection process. We therefore recommend that all judges in state court systems be selected through a commission-based appointment process. An independent, nonpartisan, broadly based nominating commission provides a necessary element of pre-selection review that serves to insulate the appointment process from political influence. Moreover, it promotes the independent

selection of capable and qualified judicial candidates, which is a necessary component of an impartial and effective judicial system.

In making this recommendation, we join with those, particularly the American Bar Association and the American Judicature Society, who have long supported this notion.[†] These organizations have developed detailed guidelines and models for the establishment of judicial nominating commissions.⁸⁵ We urge state officials to review these standards in establishing nominating commissions for their states.

With respect to this recommendation, we would further note a number of basic features essential to a properly functioning nominating process. First and foremost, the commission must be able to act independently. It must be free to recruit, review, and recommend candidates without being subject to partisan or political pressures. We therefore support commissions consisting of a mixture of lawyers, non-lawyers, and ex-officio judges who serve fixed terms of office. The responsibility for selecting members should be divided among diverse appointing authorities, including the governor, the legislature, members of the state's highest court, and bar association officers.

Nominating commissions also must operate through open and regular procedures that encourage applications from and consideration of the widest possible pool of candidates. Commissions should be charged with the responsibility of actively recruiting highly-qualified candidates in order to strengthen their available choices. In screening these candidates, they should rely on a broad range of criteria in order to ensure a thorough and fair assessment of the relative merits of judicial aspirants.

It is also necessary for state judicial selection systems to specify that the governor (or other appointing authority under state statute) is required to draw judicial nominees from the list of candidates provided by nominating commissions. Absent such a provision, nominating commissions may become merely advisory bodies, which would diminish their value.

Finally, in order to ensure a timely and efficient selection process, nominating commissions should be required to submit candidates in a timely manner when a position becomes open. The vast majority of states that now use nominating commissions impose time limits, in most cases from 30 to 60 days, that encourage the body to act quickly in recommending individuals to fill a vacancy.⁸⁶ This restriction helps to avoid situations where a vacancy is left unfilled for a lengthy period of time.

Require Periodic Review and Evaluation

An appointment-based selection process must include a periodic review of the performance of judges at regular intervals. Accordingly, judges should be appointed for terms of fixed length, with eligibility to be reappointed. The length of the terms established should be appropriate to the level of the court. With respect to the highest courts, we suggest a minimum term of ten years. The terms of members of the highest courts also should be staggered to ensure reasonable continuity.

Most states that use some form of appointment, whether it be entirely or in the first instance, limit the length of terms of office, even on the court of last resort. Only three states do not follow this practice.[‡] Terms of fixed length provide appointing authorities

[†] The American Judicature Society has supported the use of judicial nominating commissions since 1913 and the American Bar Association has endorsed the use of judicial nominating commissions in merit selection systems since 1937.

[‡] In Rhode Island, justices on the high court serve life terms. In Massachusetts and New Hampshire, justices are allowed to serve until age 70.

with a pre-determined opportunity to assess the performance of judges and decide whether they should continue to hold their positions.

At the time of a judge's reappointment, state authorities should be required to carry out a careful and thorough review of that judge's performance. The findings of this review should be given due consideration in making a reappointment decision. **To facilitate this process, we recommend that each state establish a judicial performance evaluation committee to review the performance of judges and make a public recommendation as to whether a judge should be reappointed. These performance evaluation commissions should be modeled on the judicial retention evaluation programs described in our previous discussion of election reforms.**

In the case of retention elections, the performance reports of judicial evaluation commissions are made available to voters for their use in making voting decisions. But the model could easily be adapted to an appointment system. In this regard the findings would be used as a basis for a recommendation for or against reappointment. The commission would conduct a comprehensive review of a judge's performance in office and submit a report to a governor (or other appointing authority, as dictated by state law). This evaluation would provide a source of independent and objective information that would enhance deliberations on reappointment decisions. To preserve gubernatorial discretion, the commission's recommendation on reappointment should not be binding, although we expect that the commission's guidance would be followed in most cases. The same process of evaluation by a judicial performance commission would take place at the completion of each subsequent term for each judge.

Judicial performance evaluation commissions ensure accountability in the selection process. This type of assessment holds judges responsible for their overall performance,

including their management of caseloads, behavior towards all those who appear before them, and rates of reversal on appeal. They also encourage civic involvement in the process, not only by including citizens as commission members, but also by soliciting public comment on judges' performance. For example, in Alaska, Arizona, and Colorado, the evaluation commission review includes surveys of attorneys and others who participate in court proceedings, information gathered at public hearings, or written public comments (see Table 2). Moreover, it provides judges with the information needed to help them improve their performance and address areas of concern. Indeed, judges have found such reviews to be as useful as voters do, especially in those states that conduct confidential midterm evaluations that are intended for a judge's self-improvement.⁸⁷ **We believe that such midterm evaluations add significant value in making judges accountable for their actions. We therefore strongly recommend that they be included in any program of performance evaluation.**

Ensure Adequate Compensation

The efficacy of a commission-based appointment system depends on having a broad pool of qualified individuals who are willing to serve as judges. Although the vast majority of those who seek judgeships act out of a desire to serve their communities and their profession, the level of compensation can be a disincentive for highly-qualified individuals to act on their desires. Most of those who serve as nominating commission chairs report that a low level of compensation, as perceived by potential judicial nominees, is an important factor in discouraging individuals from agreeing to be considered for vacant judgeships. The only other major deterrent is the desire of potential candidates to continue to practice law.⁸⁸ This decision may also reflect the relatively low compensation presently offered to state court judges.

The compensation provided to state court

Table 2

Model Judicial Evaluation Procedures

	Alaska	Arizona	Colorado	Utah
Groups surveyed	Alaska Bar members; peace and probation officers who handle criminal cases; court staff; jurors for last 2 years of term	Lawyers, litigants, witnesses, jurors, other judges/justices, staff	Jurors, litigants, court personnel, probation officers, social service and law enforcement personnel, crime victims, attorneys	Attorneys; jury surveys began in 1997
Nonsurvey sources of information	Judge's self-evaluation; legal, discipline, or health records; attorneys in 9-12 major cases handled by judge; judicial conduct commission; conflict of interest filings; other case information	Judge's previous self-evaluations and professional goals	Caseload evaluation; interview with the judge	Compliance with cases-under-advisement standard; physical and mental competence; completion of 30 hours continuing education per year; in substantial compliance with Code of Judicial Conduct and Code of Judicial Administration
Public input	Hearings, newspaper ads and PSAs encourage public comment	Public hearings; requests for public comment in writing	Public hearings authorized in 1997; public comments in writing	No
Judge interview mandatory?	Council "may" interview; draft results shared with judge prior to final evaluation meeting	Factual report must be sent to judge; judge can submit written response; conference team interviews	Yes, after receiving analysis of questionnaire results	Judge may request interview if he or she fails to meet certification standards

SOURCE: Kevin M. Esterling, "Judicial Accountability the Right Way," *Judicature*, vol. 82, no. 5 (1999), p. 209.

judges should not be so low that it discourages well-qualified individuals from seeking judge-ships. According to a 2001 survey by the National Center for State Courts, annual salaries of associate justices of the highest state courts range from about \$89,400 to \$162,400, with a median of \$116,500. Salaries of judges of general jurisdiction trial courts range from about \$81,600 to \$137,200, with a median of \$113,000.⁸⁹ These ranges fall well below the salaries earned by attorneys at many law firms. **Accordingly, as a corollary to our call for commission-based appointment systems, we urge state officials to ensure that appropriate levels of compensation are provided to judges**

at all levels. This will enhance the efficacy of the judicial selection process by encouraging a larger number of highly qualified individuals to enter the nominating process.

MERIT SELECTION AS AN ALTERNATIVE

We acknowledge that most states will find it politically impracticable to move to a commission-based appointment system any time soon. A fully appointed judiciary requires a fundamental transformation of the judiciaries in most states. In many of these states, this change demands a shift away from a widely

accepted practice deeply embedded in the state's political culture. For those states that do not adopt an appointive system, we prefer the use of merit selection as an alternative to selection by popular vote.

We regard appointment as the grounding principle of judicial selection. We prefer merit selection systems because they have the virtue of appointing judges in the first instance. And the retention elections that are employed in these systems pose less of a threat to judicial independence than other types of judicial elections. Retention elections do not require a candidate to face an opponent, so they tend to be less contentious and less expensive. They are usually low visibility elections. They rarely lead to the removal of an appointed judge.

However, merit selection systems still have the drawback that they do not eliminate the problems associated with elections. Contested retention contests can become just as combative, expensive, and politicized as competitive races between opposing candidates. They can be a focal point of interest group electioneering. And they usually devolve into a debate over a single policy issue or, in the worst cases, a single judicial decision.

States that now rely on merit selection systems to choose judges, as well as those states that move to this method in the future, should ensure that their systems incorporate safeguards to enhance the continuing independence and quality of their judiciaries. Specifically, we urge states to follow the model that we have outlined in our call for an appointive system. States that do not currently use nominating commissions to identify potential judicial nominees should establish a commission and require that the appointing authority select a candidate from its list of nominees. Commission-based nominations should be used to fill interim vacancies, as well as appointments in the first instance. Further, we recommend that states establish judicial retention evaluation programs to assess candidates running in retention elections. As noted previously in our discussion, we feel that this

approach will give voters access to independent, objective information about the candidates, which will promote more informed voting decisions.

CONCLUSION

Court decisions affect many aspects of American life. They determine the scope of citizens' liberties, the substantive legal rules governing everyday transactions, the nature of the products available in the marketplace, and the caliber of our system of justice. State courts, in particular, are responsible for interpreting and enforcing common law doctrines that, unless modified by statute, determine the legal responsibilities for the harms associated with a wide variety of products, actions, and social risks that citizens may encounter in their daily lives. In essence, they define what constitutes appropriate legal protection in our society.

Given the vital role of courts, citizens must have confidence in the integrity and impartiality of the judicial process. The courts must be accepted as a credible forum for resolving legal disputes. Those who appear before them must have faith that they will receive a fair hearing before a judge whose discretion and judgment will not be skewed by influences outside of the law. Such confidence is essential to the effective rule of law.

The current patchwork of diverse methods of judicial selection does not fulfill the need for an impartial and independent system of justice. The threat to our judicial system that stems from the manner in which judges are selected in 39 of the states is real and growing. As more races become partisan battles between conflicting economic interests or political parties, respect for the system will continue to erode.

There is a comparable threat to federalism. Recall the chilling words of the judge who warned that it is all too easy for a court and a jury to punish an out-of-state defendant economically to benefit local residents.

One study of 75,000 tort decisions from across the states has found that jury awards against out-of-state defendants are substantially larger than awards against in-state defendants.⁹⁰ Such outcomes are to be expected when judges are subject to political and electoral pressures.

We cannot be optimistic about our ability to remedy the problem. The task of seeking substantial reform in most states is daunting. Success will require even greater public support than that which secured campaign finance reform at the federal level after many years of effort.

An alternative that might resolve some of the problems we have raised would be to expand the diversity jurisdiction of our federal courts. There is some precedent for this alternative, which would require an Act of Congress. Congress might enact a minimum standard for state judicial selection that could, for example, restrict judicial selection to retention elections that are publicly funded. In any

state that did not meet that minimum standard, an out-of-state defendant would have a greatly expanded right to remove the case to federal court on diversity grounds.

Whether this approach or some other proves feasible is beyond the scope of this paper. But it merits consideration in future discussions of the problems associated with judicial elections.

CED believes that there is a compelling need for a broad public dialogue on the problems of judicial selection. We offer this report in an effort to promote such a dialogue and thereby stimulate a thoughtful and wide-ranging debate about the best means of ensuring a qualified, independent, and accountable judiciary. We have offered recommendations that set forth a direction for reform that we feel best conforms to the principled role our nation expects of its judicial system. We hope that our efforts will encourage additional suggestions for guaranteeing the impartial administration of justice for all Americans.

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Appendix:

Judicial Selection in the States

APPELLATE AND GENERAL JURISDICTION COURTS 2002

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
ALABAMA						
Supreme Court				X	6	Re-election for additional terms
Court of Civil Appeals				X	6	Re-election for additional terms
Court of Criminal Appeals				X	6	Re-election for additional terms
Circuit Court				X	6	Re-election for additional terms
ALASKA						
Supreme Court	X				3	Retention election (10 year term)
Court of Appeals	X				3	Retention election (8 year term)
Superior Court	X				3	Retention election (6 year term)
ARIZONA						
Supreme Court	X				2	Retention election (6 year term)
Court of Appeals	X				2	Retention election (6 year term)
Superior Court (County population > 250,000)	X				2	Retention election (4 yearterm)
Superior Court (County population < 250,000)			X		4	Re-election for additional terms
ARKANSAS						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Circuit Court			X		4	Re-election for additional terms
CALIFORNIA						
Supreme Court		X(G) ¹			12	Retention election (12 year term)
Courts of Appeal		X(G)			12	Retention election (12 year term)
Superior Court ²			X		6	Nonpartisan election (6 year term)

1. Gubernatorial (G) or Legislative (L)

2. The California constitution provides that local electors may choose gubernatorial appointments instead of nonpartisan election to select superior court judges. As of July 1999, no counties have chosen gubernatorial appointments.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
COLORADO						
Supreme Court	X				2	Retention election (10 year term)
Court of Appeals	X				2	Retention election (8 year term)
District Court	X				2	Retention election (6 year term)
CONNECTICUT						
Supreme Court	X				8	Commission reviews incumbent’s performance on noncompetitive basis; governor renominates and legislature confirms.
Appellate Court	X				8	Same
Superior Court	X				8	Same
DELAWARE ³						
Supreme Court	X				12	See footnote ⁴
Court of Chancery	X				12	See footnote ⁴
Superior Court	X				12	See footnote ⁴
DISTRICT OF COLUMBIA						
Court of Appeals	X				15	Reappointment by judicial tenure commission ⁵
Superior Court	X				15	Reappointment by judicial tenure commission ⁵
FLORIDA						
Supreme Court	X				1	Retention election (6 year term)
District Court of Appeal	X				1	Retention election (6 year term)
Circuit Court			X		6	Re-election for additional terms
GEORGIA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Superior Court			X		4	Re-election for additional terms

3. Merit selection established by executive order in Delaware, Maryland, Massachusetts, and New Hampshire. In all other jurisdictions merit selection is established by constitutional or statutory provision.

4. Incumbent reapplies to nominating commission and competes with other applicants for nomination to the governor. The governor may reappoint the incumbent or another nominee. The Senate confirms the appointment.

5. Initial appointment is made by the President of the United States and confirmed by the Senate. Three months prior to the expiration of the term of office, the judge's performance is reviewed by the tenure commission. Those found "Exceptionally Well Qualified" or "Well Qualified" are automatically reappointed. If a judge is found to be "Qualified" the President may nominate the judge for an additional term (subject to Senate confirmation). If the President does not wish to reappoint the judge, the District of Columbia Nomination Commission compiles a new list of candidates.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
HAWAII						
Supreme Court	X				10	Reappointment to subsequent term by Judicial Selection Commission (10 year term)
Intermediate Court of Appeals	X				10	Same
Circuit Court and Family Court	X				10	Same
IDAHO						
Supreme Court			X		6	Re-election for additional terms
Courts of Appeals			X		6	Re-election for additional terms
District Courts			X		4	Re-election for additional terms
ILLINOIS						
Supreme Court				X	10	Retention election (10 year term)
Appellate Court				X	10	Retention election (10 year term)
Circuit Court				X	6	Retention election (6 year term)
INDIANA						
Supreme Court	X				2	Retention election (10 year term)
Court of Appeals	X				2	Retention election (10 year term)
Circuit Court				X	6	Re-election for additional terms
Circuit Court (Vanderburgh County)			X		6	Re-election for additional terms
Superior Court				X	6	Re-election for additional terms
Superior Court (Allen County)			X		6	Re-election for additional terms
Superior Court (Lake County)	X ⁶				2	Retention election (6 year term)
Superior Court (St. Joseph County)	X				2	Retention election (6 year term)
Superior Court (Vanderburgh County)			X		6	Re-election for additional terms
IOWA						
Supreme Court	X				1	Retention election (8 year term)
Court of Appeals	X				1	Retention election (6 year term)
District Court	X				1	Retention election (6 year term)

6. Three of the judges run in partisan elections for 6 year terms then have to be re-elected for additional terms.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
KANSAS						
Supreme Court	X				1	Retention election (6 year term)
Court of Appeals	X				1	Retention election (4 year term)
District Court (17 districts)	X				1	Retention election (4 year term)
District Court (14 districts)				X	4	Re-election for additional terms
KENTUCKY						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Circuit Court			X		8	Re-election for additional terms
LOUISIANA						
Supreme Court				X ⁷	10	Re-election for additional terms
Court of Appeals				X ⁷	10	Re-election for additional terms
District Court				X ⁷	6	Re-election for additional terms
MAINE						
Supreme Judicial Court		X(G)			7	Reappointment by governor, subject to legislative confirmation
Superior Court		X(G)			7	Same
MARYLAND ⁸						
Court of Appeals	X				see fn ⁹	Retention election (10 year term)
Court of Special Appeals	X				see fn ⁹	Retention election (10 year term)
Circuit Court	X				see fn ⁹	Nonpartisan election (15 year term) ¹⁰
MASSACHUSETTS ¹¹						
Supreme Judicial Court	X				to age 70	
Appeals Court	X				to age 70	
Trial Court of Mass.	X				to age 70	

7. Louisiana judicial elections are partisan in as much as the candidates' party affiliations appear on the ballot. However, two factors lend a somewhat nonpartisan character to these elections: (1) primaries are open to all candidates; and (2) judicial candidates generally do not solicit party support for their campaigns.

8. See Delaware, footnote 3.

9. Until the first general election following the expiration of one year from the date of the occurrence of the vacancy.

10. May be challenged by other candidates.

11. See Delaware, footnote 3.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
MICHIGAN ¹²						
Supreme Court				X	8	Re-election for additional terms
Court of Appeals				X	6	Re-election for additional terms
Circuit Court				X	6	Re-election for additional terms
MINNESOTA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms
MISSISSIPPI						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Chancery Court			X		4	Re-election for additional terms
Circuit Court			X		4	Re-election for additional terms
MISSOURI						
Supreme Court	X				1	Retention election (12 year term)
Court of Appeals	X				1	Retention election (12 year term)
Circuit Court				X	6	Re-election for additional terms
Circuit Court (Jackson, Clay, Platte, Saint Louis Counties)	X				1	Retention election (6 year term)
MONTANA						
Supreme Court			X		8	Re-election; unopposed judges run for retention
District Court			X		6	Re-election; unopposed judges run for retention
NEBRASKA						
Supreme Court	X				3	Retention election (6 year term)
Court of Appeals	X				3	Retention election (6 year term)
District Court	X				3	Retention election (6 year term)
NEVADA						
Supreme Court			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms

12. On the Michigan ballot, party affiliation does not appear beside the names of judicial candidates. In this way, the system is technically nonpartisan. However, candidates are nominated from party conventions, and frequently run with party endorsements. This system for nominating candidates in Michigan coupled with recent general election campaigns, reveals that, in substance if not in law, the character of Michigan's selection system is in fact highly partisan.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
NEW HAMPSHIRE ¹³						
Supreme Court	X ¹⁴				to age 70	
Superior Court	X ¹⁴				to age 70	
NEW JERSEY						
Supreme Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
Appellate Division of Superior Court		X(G)			7	Same
Superior Court		X(G)			7	Same
NEW MEXICO						
Supreme Court	X				Until next general election	See footnote ¹⁵
Court of Appeals	X				Until next general election	See footnote ¹⁵
District Court	X				Until next general election	See footnote ¹⁵
NEW YORK						
Court of Appeals	X				14	See footnote ¹⁶
Appellate Division of the Supreme Court	X				5	Commission reviews and recommends for or against reappointment by the Governor
Supreme Court				X	14	Re-election for additional terms
County Court				X	10	Re-election for additional terms
NORTH CAROLINA						
Supreme Court				X	8	Re-election for additional terms
Court of Appeals				X	8	Re-election for additional terms
Superior Court			X		8	Re-election for additional terms

13. See Delaware, footnote 3.

14. The Governor's nomination is subject to the approval of a five-member executive council.

15. Partisan election at next general election after appointment for eight-year term for appellate judges, six-year term for district. The winner thereafter runs in a retention election for subsequent terms.

16. Incumbent reapplies to nominating commission and competes with other applicants for nomination to the governor. The governor may reappoint the incumbent or another nominee. The Senate confirms the appointment.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
NORTH DAKOTA						
Supreme Court			X		10	Re-election for additional terms
District Court			X		6	Re-election for additional terms
OHIO ¹⁷						
Supreme Court				X	6	Re-election for additional terms
Court of Appeals				X	6	Re-election for additional terms
Court of Common Pleas				X	6	Re-election for additional terms
OKLAHOMA						
Supreme Court	X				1	Retention election (6 year term)
Court of Criminal Appeals	X				1	Retention election (6 year term)
Court of Appeals	X				1	Retention election (6 year term)
District Court			X		4	Re-election for additional terms
OREGON						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
Tax Court			X		6	Re-election for additional terms
PENNSYLVANIA						
Supreme Court				X	10	Retention election (10 year term)
Superior Court				X	10	Retention election (10 year term)
Commonwealth Court				X	10	Retention election (10 year term)
Court of Common Pleas				X	10	Retention election (10 year term)
RHODE ISLAND						
Supreme Court	X				Life	
Superior Court	X				Life	
Worker's Compensation Court	X				Life	

17. Ohio general elections do not list party affiliations on the ballot. Candidates, however, must run in partisan primary elections and frequently run with party endorsements. Recent elections for the Ohio Supreme Court reveal a pattern of partisan elections in substance if not in law.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
SOUTH CAROLINA ¹⁸						
Supreme Court		X(L)			10	Reappointment by legislature
Court of Appeals		X(L)			6	Reappointment by legislature
Circuit Court		X(L)			6	Reappointment by legislature
SOUTH DAKOTA						
Supreme Court	X				3	Retention election (8 year term)
Circuit Court			X		8	Re-election for additional terms
TENNESSEE						
Supreme Court	X				See fn ¹⁹	Retention election (8 year term)
Court of Appeals	X				See fn ¹⁹	Retention election (8 year term)
Court of Criminal Appeals	X				See fn ¹⁹	Retention election (8 year term)
Chancery Court				X	8	Re-election for additional terms
Criminal Court				X	8	Re-election for additional terms
Circuit Court				X	8	Re-election for additional terms
TEXAS						
Supreme Court				X	6	Re-election for additional terms
Court of Criminal Appeals				X	6	Re-election for additional terms
Court of Appeals				X	6	Re-election for additional terms
District Court				X	4	Re-election for additional terms
UTAH						
Supreme Court	X				First	Retention election (10 year term)
Court of Appeals	X				general	Retention election (6 year term)
District Court	X				election	Retention election (6 year term)
Juvenile Court	X				>3 years after appointment	Retention election (6 year term)

18. South Carolina has an 11 member Judicial Merit Selection Commission that screens judicial candidates and reports the findings to the state's General Assembly. Since 1997, the Assembly is restricted to voting only on those candidates found qualified by the Judicial Merit Selection Commission. However, the nominating commission itself is not far removed from the ultimate appointing body, and cannot be considered to be nonpartisan as control over member nominations is vested in majority party leadership. Although most nominating commissions contain members appointed by the governor or legislature, no other commissions actually contain the governor or current legislators who have final approval over the candidates as voting members of the commission. In contrast, the Judicial Merit Selection Commission in South Carolina contains 6 current members of the General Assembly appointed by the Speaker of the House of Representatives, the Chairman of the Senate Judiciary Committee, and the President Pro Tempore of the Senate. State legislators also choose the remaining 4 members of the Commission, which include judges and the lay public.

19. Until the next biennial general election.

STATE AND COURT	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection Through Nominating Commission	Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
VERMONT						
Supreme Court	X				6	Retained by vote of General Assembly (6 year term)
Superior Court	X				6	Same
District Court	X				6	Same
VIRGINIA						
Supreme Court		X(L)			12	Reappointment by legislature
Court of Appeals		X(L)			8	Reappointment by legislature
Circuit Court		X(L)			8	Reappointment by legislature
WASHINGTON						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Superior Court			X		4	Re-election for additional terms
WEST VIRGINIA						
Supreme Court				X	12	Re-election for additional terms
Circuit Court				X	8	Re-election for additional terms
WISCONSIN						
Supreme Court			X		10	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
WYOMING						
Supreme Court	X				1	Retention election (8 year term)
District Court	X				1	Retention election (6 year term)

SOURCE: American Judicature Society, *Judicial Selection in the States*, (April 2002), available at <<http://www.ajs.org/js/Jud%20Sel%20Chart%20-%20Apr%202002.pdf>>. Reprinted with permission.

Memorandum of Comment, Reservation, or Dissent

Page 4, EDMUND B. FITZGERALD with which PATRICK W. GROSS has asked to be associated.

The statement strongly recommends expanding the use of judicial nominating commissions based on perceived equity, as well as a broad spectrum of successful current practices. It notes, however, some states many not wish to follow this procedure, and in these cases judicial elections should be publicly funded.

But public funding would not address many of the shortcomings of judicial elections identified in this report: they may only be a crutch, one with severe implementation problems. This is a far less desirable outcome and we should hesitate to embrace it.

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